Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, AN ILLINOIS NOT-FOR-PROFIT CORPORATION, JAMES J. BROPHY, JOHN T. RETTALIATA, AND MAYNARD P. VENEMA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Petition for a Writ of Certiorari	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes, and Rule	2
Statement of the Case	4
Reasons for Granting the Writ	10
The Court of Appeals, by Requiring a Plaintiff to Plead "Specific Facts", Has Decided a Federal Question in a Way in Conflict with Applicable Decisions of This Court	12
The Court of Appeals Has Rendered a Decision on What Constitutes "State Action" Under 42 U. S. C. § 1983 in Conflict with Decisions of Other Courts of Appeals in the Same Matter	14
The Court of Appeals Has Decided an Important Question of Federal Law. As to Whether 42 U. S. C. § 1985(3) Reaches Private Nonracial Conspiracies, Which Question Has Not Been, but Should Be, Settled by This Court; the Decision Conflicts Directly with Decisions of Other Courts of Appeals in the Same Matter	18
Conclusion	22

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases

Action v. Gannon, 450 F. 2d 1227 (8th Cir. 1971) ...18, 20
Adickes v. S. H. Kress & Co., 398 U. S. 144 (1970) 15
Azar v. Conley, 456 F. 2d 1382 (6th Cir. 1976) 19
Baer v. Baer, 450 F. Supp. 481 (N. D. Cal. 1978) 21
Bellamy v. Mason's Stores, Inc., 508 F. 2d 504 (4th Cir. 1974) 20
Braden v. University of Pittsburgh, 477 F. 2d 1 (3rd Cir. 1973) 15
Braden v. University of Pittsburgh, 552 F. 2d 948 (3rd Cir. 1977) 9, 11, 15, 16, 17
Britt v. Suckle, 453 F. Supp. 987 (E. D. Tex. 1978)...20, 21
Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) 11, 14
Cameron v. Brock, 473 F. 2d 608 (6th Cir. 1973) 20
Cannon v. University of Chicago, 559 F. 2d 1063 (7th Cir. 1977), *cert. granted*, 46 U. S. L. W. 3803 (No. 77-926, July 3, 1978) 11, 16
Chalfant v. Wilmington Institute, 574 F. 2d 739 (3rd Cir. 1978) 15
Cohen v. Illinois Institute of Technology, 384 F. Supp. 202 (N. D. Ill. 1974), *aff'd*, 524 F. 2d 818 (7th Cir. 1975), *cert. denied*, 425 U. S. 943 (1976) .....*passim*
Coleman v. Wagner College, 429 F. 2d 1120 (2nd Cir. 1970) 15
Commonwealth of Pennsylvania v. Local Union No. 542, 347 F. Supp. 268 (E. D. Pa. 1972) 21

Conley v. Gibson, 355 U. S. 41 (1957) 10, 12, 13
District of Columbia v. Carter, 409 U. S. 418 (1973) .. 21
Doe v. Charleston Area Medical Center, Inc., 529 F. 2d 638 (4th Cir. 1975) 15
Dombrowski v. Dowling, 459 F. 2d 190 (7th Cir. 1972) 20, 21
Doski v. M. Goldseker Co., 539 F. 2d 1326 (4th Cir. 1976) 20
Dúrso v. Rowe, 430 F. Supp. 49 (N. D. Ill. 1977), *rev'd*, 579 F. 2d 1365 (7th Cir. 1978) 10, 13
Faro v. New York University, 502 F. 2d 1229 (2nd Cir. 1974) 22
Foman v. Davis, 371 U. S. 178 (1962) 9
Fortin v. Darlington Little League Inc., 514 F. 2d 344 (1st Cir. 1975) 8
Golden v. Biscayne Bay Yacht Club, 530 F. 2d 16 (5th Cir. 1976), *rev'g on rehearing* 521 F. 2d 344 (5th Cir. 1975) 16
Grafton v. Brooklyn Law School, 478 F. 2d 1137 (2nd Cir. 1973) 11, 15
Griffin v. Breckenridge, 403 U. S. 88 (1971) 11, 18, 19
Haines v. Kerner, 404 U. S. 519 (1972), *rev'g* 427 F. 2d 71 (7th Cir. 1970) 12, 13
Hammond v. University of Tampa, 344 F. 2d 951 (5th Cir. 1965) 15
Harrison v. Brooks, 446 F. 2d 404 (1st Cir. 1971) 19
Jackson v. Metropolitan Edison Co., 419 U. S. 345 (1974) 11, 14, 15, 17
Jackson v. Statler Foundation, 496 F. 2d 623 (2nd Cir. 1974), *cert. denied*, 420 U. S. 927 (1975) 15

Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968) ... 12

Jr. C. of C., Rochester, Inc., N. Y. v. U. S. Jaycees, Tulsa, Okla., 495 F. 2d 883 (10th Cir. 1974), *cert. denied*, 419 U. S. 1026 (1974) 16

Junior Chamber of C. of K. C., Mo. v. Missouri St. J. C. of C., 508 F. 2d 1031 (8th Cir. 1975) 16

Katzenbach v. Morgan, 384 U. S. 641 (1966) 21

Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U. S. 721 (1945) 15

Lesser v. Braniff Airways, Inc., 518 F. 2d 538 (7th Cir. 1975) 20

Lopez v. Arrowhead Ranches, 523 F. 2d 924 (9th Cir. 1975) 20

Magill v. Avonworth Baseball Conference, 516 F. 2d 1328 (3rd Cir. 1975) 16

Marlowe v. Fisher Body, 489 F. 2d 1057 (6th Cir. 1973) 20

McLellan v. Mississippi Power & Light Co., 526 F. 2d 870 (5th Cir. 1976), *rev'd on rehearing*, 545 F. 2d 919 (5th Cir. 1977) 18

Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975), *cert. denied*, 424 U. S. 958 (1976) 20

Milner v. National School of Health Technology, 409 F. Supp. 1389 (E. D. Pa. 1976) 16

Murphy v. Mount Carmel High School, 543 F. 2d 1189 (7th Cir. 1976) 18, 20

New York City Jaycees v. United States Jaycees, Inc., 512 F. 2d 856 (2nd Cir. 1975) 16

Oregon v. Mitchell, 400 U. S. 112 (1970) 21

Parks v. "Mr. Ford", 556 F. 2d 132 (3rd Cir. 1977) ... 15

Phillips v. Trello, 502 F. 2d 1000 (3rd Cir. 1974) 19

Powe v. Miles, 407 F. 2d 73 (2nd Cir. 1968) 14, 15

Powell v. Syracuse University, 580 F. 2d 1150 (2nd Cir. 1978) 23

Reichardt v. Paine, 396 F. Supp. 1010 (N. D. Cal. 1975) 20

Richardson v. Miller, 446 F. 2d 1247 (3rd Cir. 1971) . . 18, 19

Robinson v. Price, 553 F. 2d 918 (5th Cir. 1977) 15

Sams v. Ohio Valley General Hospital Ass'n., 413 F. 2d 826 (4th Cir. 1969) 15

Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (4th Cir. 1963), *cert. denied*, 376 U. S. 938 (1964) 15

Wahba v. New York University, 492 F. 2d 96 (2nd Cir. 1974), *cert. denied*, 419 U. S. 874 (1974) 15

Weise v. Syracuse University, 522 F. 2d 397 (2nd Cir. 1975) 7, 15, 18, 19

Westberry v. Gillman Paper Co., 507 F. 2d 206 (5th Cir. 1975), *opinion withdrawn as moot*, 507 F. 2d 216 . . . 18, 19

Statutes and Constitutional Provisions

Constitution of the United States

Thirteen Amendment 19

Fourteenth Amendment 6, 10, 11, 18

Constitution of the State of Illinois

Article 1, Section 2 3

Article 1, Section 17 3

Federal Statutes

42 U. S. C. § 1983 .....*passim*

42 U. S. C. § 1985(3) .....*passim*

Federal Rules of Civil Procedure

Rule 8 ..... 9, 10, 11, 12
Rule 12 6
Rule 15(a) 7
Rule 60(b) 7

Other Authorities

Executive Orders

No. 11246 (30 F. R. 12319), 3 C. F. R. 339 (1964-1965 Comp.) 5
No. 11375 (33 F. R. 14303), 3 C. F. R. 684 (1966-1970 Comp.) 5

Law Reviews, Etc.

Cassel, "Civil Rights and Civil Liberties," 53 *Chicago-Kent L. Rev.* 244 (1976) 9

Estreicher, "Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments," 74 *Columbia L. Rev.* 450 (1974) 21

Elkind, "State Action: Theories for Applying Constitutional Restructions to Private Activity," 74 *Columbia L. Rev.* (1974) 17

Hemphill, "State Action and Civil Rights" 23 *Mercer L. Rev.* 519 (1972) 21

Larson, "Employment Discrimination," Vol. I, § 8.20, p. 2-74; and June 1978 Cumulative Supplement, p. 63 9

Maier, "State Action in the Seventh Circuit," 59 *Marquette L. Rev.* 809 (1976) 9

Note, "Absent State Involvement, Right of Association Not Protected by 42 U. S. C. § 1985," *Richmond L. Rev.* 53-57 (1975) 22

Note, "Defining the Scope of the Enforcement Clause of the Fourteenth Amendment—*Murphy* v. *Mount Carmel High School*," 36 *DePaul L. Rev.* 682 (1977) 21

Note, "Legislative State Action and Indiana Private Universities," 9 *Valparaiso L. Rev.* 611 (1975) 17

Note, "Private Conspiracies to Violate Civil Rights; *McLellan* v. *Mississippi Power & Light Co.*," 90 *Harv. L. Rev.* 1721 (1977) 21

Note, "State Action and the United States Junior Chamber of Commerce," 43 *G. Wash. L. Rev.* 1407 (August 1975) 17

Note, " 'State Action' in the Seventh Circuit," 59 *Marquette L. Rev.* 809 (1976) 17

O'Neil, "Private Universities and Public Law," 19 *Buffalo L. Rev.* 155 (1970) 17

Orloski, "The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power," 40 *St. John's L. Rev.* 493-510 (1975) 21

Roth, "Private Interference with an Individual's Civil Rights: A Redressable Wrong under § 5 of the Fourteenth Amendment?" 51 *Notre Dame Lawyer* 120-140 (1975) 21

Yackle, "The Burger Court, 'State Action' and Congressional Enforcement of the Civil War Amendments," 27 *Alabama L. Rev.* 479 (Fall 1975) 16, 21

United States Commission on Civil Rights, "The Federal Civil Rights Enforcement Effort—1974," Vol. III, "To Insure Equal Education Opportunity" (January 1975) 22

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Dr. Helen A. Cohen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINION BELOW

The amended opinion of the Court of Appeals for the Seventh Circuit (hereinafter *"Cohen III"*) is reported at 581 F. 2d 658, and is set out in its original form as Appendix I, at pp. 34a-42a. The order of the court of appeals amending the original opinion but denying rehearing is set out as Appendix J, at pp. 43a-44a.

These and prior opinions in this case are set out in the separate Appendix in chronological order.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1978 (App. I, at 34a). A timely petition for rehearing was denied on August 28, 1978 (App. J, at 43a). This Court has jurisdiction pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. As to Rule 8, Fed. R. Civ. P.:

   Whether, in a complaint which alleges sufficient State involvement with an otherwise-private institution to invoke 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3), it is additionally necessary, for compliance with Rule 8, Fed. R. Civ. P., to allege "specific facts" detailing the State's involvement with the institution's discriminatory conduct.

2. As to 42 U. S. C. § 1983:

   Whether receipt of significant State aid and support by an otherwise-private institution subjects the institution to the State's obligations under the Equal Protection Clause, enforceable through 42 U. S. C. § 1983, even though there may be no close nexus between the State and the institution's discriminatory conduct.

3. As to 42 U. S. C. § 1985(3):

   Whether 42 U. S. C. § 1985(3), by virtue of § 5 of the Fourteenth Amendment, reaches private, nonracially motivated, invidiously discriminatory conspiracies.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

U. S. Constitution, amendment XIV, § 1 and § 5:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Illinois Constitution, Art. I, § 2 and § 17 (1970); effective July 1, 1971):

§ 2. Due Process and Equal Protection.

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

§ 17. No Discrimination in Employment and the Sale or Rental Property

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for the violation.

42 U. S. C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985. Conspiracy to interfere with civil rights.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises

of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws: . . . in any cases of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Rule 8, Federal Rules of Civil Procedure:

(a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. . . .

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

STATEMENT OF THE CASE

This case, alleging denial of equal protection by reason of gender-based discrimination, comes to the Court after the third decision by the U. S. Court of Appeals for the Seventh Circuit (*"Cohen III"*; App. I, at 34a).

In the first decision (*"Cohen I"*; App. B, at 17a) the court of appeals delineated the allegations necessary to state a claim under 42 U. S. C. § 1983 and 42 U. S. C. § 1985. Petitioner then obtained leave to amend her complaint (*"Cohen II"*, App. F., at 27a).

The court of appeals has now held that the amended complaint, though it "contain[s] the precise language noted by this Court to have been missing from the original complaint" (App. I, at 38a), does not state a claim under either statute because it does not plead "specific facts" describing the State's involvement with the institution's discriminatory conduct.

In more detail:

1. The Facts of the Case

Petitioner, Dr. Helen A. Cohen, a woman, was formerly employed as an untenured assistant professor by the respondent Illinois Institute of Technology ("IIT"). In each of the years 1969, 1970, and 1971, she was recommended by her department for a tenured promotion to the senior academic rank of associate professor. IIT refused her the promotion, without explanation. Under the school's tenure-promotion rules, failure to achieve promotion within a designated time meant termination.

In August 1971, while still employed by IIT, she filed charges with the U. S. Department of Labor's Office of Federal Contact Compliance, asserting discrimination on the basis of sex in violation of Executive Order No. 11246.[1] In January 1974, the OFCC compliance agency, the Department of Health, Education and Welfare, found "reasonable cause to believe that complainant was terminated in part because of her sex . . . [and] was discriminated against because of her sex . . . [by being] paid . . . less than the salary of similarly situated males" (App. K, at 45a-49a)[2]. The university's justification was deemed pretextual. (App. K, at 48a).

1. (30 F. R. 12319), 3 C. F. R. § 339 (1964-1965 Comp.), as amended by Executive Order No. 11375, (33 F. R. 14303) 3 C. F. R. § 684 (1966-1970 Comp.).

2. These findings were appended to the original complaint. Additional findings (App. L, at 50a-54a) were made in August 1976 and reconfirmed the January 1974 findings. These additional findings were before the court of appeals in *Cohen III*. HEW and OFCC have yet to take the next step toward enforcement, that is, to initiate discovery leading to a formal hearing.

2. The Original Complaint, and the First Appeal ("Cohen I")

Enforcement action by OFCC not being forthcoming, plaintiff in May 1974 brought suit in the U. S. District Court for the Northern District of Illinois. The complaint was in three counts: Under 42 U. S. C. § 1983, under 42 U. S. C. § 1985(3), and under the Illinois Constitution through pendent jurisdiction. Her complaint asserted that IIT, although formally private, was so involved with the State of Illinois that the acts of IIT are subject to the scrutiny of the Fourteenth Amendment (App. B, at 10a-12a). The individual defendants are the policy-making executives of IIT.

The district court dismissed the complaint on a motion brought under Rule 12, Fed. R. Civ. P (App. A, at 1a). As to the § 1983 count, the court found no allegation of any State aid or support to the university (App. A, at 3a). As to the § 1985(3) count, the court held that "§ 1985(3) requires . . . 'state action' " (App. A, at 3a). The pendent jurisdiction count was accordingly also dismissed.

The Court of Appeals for the Seventh Circuit affirmed (*Cohen I*; App. B, at 7a), but on different grounds. As to the § 1983 count, it examined the allegations of State involvement with IIT and concluded, contrary to the district court, that "[t]he State has lent significant support to IIT; it is not, however, alleged to have lent any support to any act of discrimination" (App. B, at 14a, 15a).

Although recognizing that the § 1983 count was couched in the language of the statute (App. B, at 17a), the court of appeals required further allegations to state a claim and obtain discovery. It held (App. B, at 17a, 18a):

> "Nevertheless, plaintiff argues that since she has alleged the necessary ultimate conclusion in the language of the statute, the complaint should not be dismissed before she has completed discovery which may reveal some nexus between the State of Illinois and defendants' wrongful conduct . . ."

> "We agree that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim which she has not made. Her complaint omits any allegation of state support or approval of the defendants' discriminatory conduct . . . .
>
> "In the *Weise* [v. *Syracuse University*, 522 F.2d 397 (2nd Cir. 1975)] case, the plaintiff had alleged that the University received so much public aid, both in the form of grants and in payment for services provided under contract, that Syracuse University was dependent on such support for its continued operation. There are no comparable allegations in Dr. Cohen's complaint."

As to the § 1985(3) count, it held that the statute, in terms, would cover a private conspiracy to discriminate on the basis of gender, but, absent State involvement either with the conspirators or "in the provision of facilities to which the victims of the conspiracy were denied equal access" (App. B, at 19a, n.27), the statute could not constitutionally reach such a conspiracy (App. B, at 18a-22a).

A petition for rehearing and suggestion for rehearing *en banc* were denied in an unsigned Order with opinion (App. C, at 32a, 24a).

Certiorari was denied. 425 U. S. 943 (1976).

3. The Motions to Amend the Complaint, and the Mandamus Action ("Cohen II")

The day after denial of certiorari, plaintiff moved in the court of appeals and in the district court to file an amended complaint (under Rules 15(a) and/or 60(b), Fed. R. Civ. P.), to insert the allegations[3] of "support," "approval", and "dependency"

3. The amendment to the complaint sought to add the following allegations:

> "8. (o) the aid and support provided by the State of Illinois, as alleged in subparagraphs (h), (i), (m), and (n) hereof, sig-

(Footnote continued on next page)

found missing by *Cohen I*, and (under Rule 60(b)(2)) to reflect newly discovered evidence concerning the extent of governmental aid—over $20 million dollars per year.

Initially the court of appeals (App. D, at 25a), and then the district court (App. E, at 26a), each denied the motion for want of jurisdiction.

Plaintiff then petitioned the court of appeals for a writ of mandamus.[4] A writ was issued, authorizing the district court to "consider and decide" the adequacy of the amended complaint (*"Cohen II"*; App. F, at 27a).

4. The Denial of the Motion to Amend, and the New Appeal ("Cohen III")

The district court then denied the motion to amend on the ground that:

> "Plaintiff's proposed amendment does not overcome the deficiencies originally found in her complaint in this court (reported at 384 F.Supp. 202) and affirmed by the Seventh Circuit. . . ." (App. G, at 29a, 30a)

Another appeal was taken. Plaintiff made two arguments.

First, under the "law of the case" doctrine, once the court of appeals in *Cohen I* had set out the necessary allegations for pleading a § 1983 and § 1985(3) complaint, it was not open to a district court to hold inadequate a complaint which included the precise language of those allegations.

(Footnote continued from preceding page.)

> nificantly supports and contributes to the effectiveness of the Defendants' conduct complained of herein. The Defendant INSTITUTE is dependent on such State support, and upon similar Federal support, for its continued operation. Both the State and the Federal support are contingent upon the Defendants not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State and Federal approval of the conduct complained of herein."

4. *Foman* v. *Davis*, 371 U. S. 178 (1962).

Second, plaintiff asked that the decision in *Cohen I* be reconsidered. *Cohen I* had in the meantime been examined by a number of other courts and by several legal commentators.[5] The Third Circuit Court of Appeals, twice sitting *en banc* in *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir. 1977), had declined to follow its § 1983 rationale and holding.

Plaintiff suggested a hearing *en banc*, but this was denied (App. H, at 32a).

The court of appeals, in *Cohen III*, affirmed (App. I, at 34a-42a). It first held that the writ of mandamus in *Cohen II* had given plaintiff the right to amend (App. I, at 38a). Then, though it did not question that "the proposed amendment contained the precise language noted by this Court to have been missing from the original complaint" (App. I, at 38a), it held (without reference to Rule 8, Fed. R. Civ. P.):

> *"Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations." (App. I, at 41a).

Rehearing and rehearing *en banc* were denied. (App. J, at 43a). The order and decision on rehearing modified the decision

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5. *Cohen* I is discussed at length in Maier, " 'State Action' in the Seventh Circuit," 59 *Marquette L. Rev.* 809 (1976), and in Cassel, "Civil Rights and Civil Liberties," 53 *Chicago-Kent L. Rev.* 244 (1976). In *Milner* v. *National School of Health Technology*, 409 F. Supp. 1389, 1394 (E. D. Pa. 1976), a § 1983 complaint that was "strikingly similar" to that in *Cohen I* was sustained notwithstanding citation of *Cohen I*.

A. Larson's "Employment Discrimination," Vol. 1, § 8.20, p. 2-74 (Matthew Bender), states that "The United States Supreme Court has recognized that certain 'private' actions may become so impregnated with state character or policies as to become subject to the same limitations on the states by the Constitution," citing *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); the June 1978 Cumulative Supplement, p. 63, adds to the citation a discussion of *Cohen I* after the words "But see."

by deleting citation to *Durso* v. *Rowe*, 430 F. Supp. 49, 52 (N. D. Ill. 1977), which, although not so stated, had since been reversed by a different panel, 579 F. 2d 1365 (7th Cir. 1978).[6]

REASONS FOR GRANTING THE WRIT

This case presents issues of fundamental importance to the practical applicability of 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3) in suits against State-supported but otherwise-private institutions and individuals to enforce a State's obligations under the Equal Protection Clause.

Primarily, are actions brought under § 1983 or § 1985(3) against such defendants subject to special pleading requirements beyond the "short and plain statement[s]" of Rule 8, Fed. R. Civ. P.? In particular, is there a requirement that a complaint must allege "specific facts" as to how the State is involved with the institution's discriminatory conduct?

Remaining in court to obtain discovery is critical to the enforceability of these civil rights statutes against State-subsidized private institutions. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance," *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1966). Only by discovery can a plaintiff learn these facts and circumstances. By their very nature, "private" institutions do not maintain public records. Yet the decision below closes the courthouse door before discovery is available. We suggest that in no other type of case is a requirement of pleading "specific facts" less appropriate.

This Rule 8 issue should have been resolved conclusively by *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957). Indeed, this Court could, in the interest of economy of its time, grant certiorari and reverse summarily on the authority of *Conley*.

6. See p. 13, *infra*.

We respectfully urge, however, that this Court go beyond the Rule 8 issue. We urge that it reach two substantive issues, each the subject of widespread and acknowledged conflicts among the circuits. The Seventh Circuit adopts minority positions regarding 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3) which severely limit the utility of these statutes in that Circuit.

First, as to "state action" under 42 U. S. C. § 1983, most of the appellate decisions apply the "symbiotic relationship" test of *Burton* v. *Wilmington Parking Authority* to otherwise-private institutions receiving significant State aid and support. Some eight court of appeals decisions, however, including *Cohen I* and *Cohen III*, instead apply exclusively the "close nexus" test of *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1964).[7] It was for this reason that the Third Circuit, in *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir. 1977) (*en banc*), declined to follow *Cohen I*.

Second, the circuits are hopelessly divided as to an issue under 42 U. S. C. § 1985(3) left open in *Griffin* v. *Breckenridge*, 403 U. S. 88, 107 (1971); does § 1985(3), by virtue of § 5 of the Fourteenth Amendment, reach private, nonracially motivated, invidiously discriminatory conspiracies? The First, Second, Third, Fifth (until its decision was withdrawn as moot), Sixth, and Eighth Circuits hold it does. The Fourth, Seventh, and Ninth hold it does not.

7. To use the current vernacular, the "bottom line" is that a State subsidy of $400 per graduate invokes § 1983 when a court applies the "symbiotic relationship" test (*Grafton* v. *Brooklyn Law School*, 478 F. 2d 1137, 1142 (2nd Cir. 1973)), while $9,600 per student *per year* does not when a court applies only the "close nexus" test (*Cannon* v. *University of Chicago*, 559 F. 2d 1063 (7th Cir. 1977), *cert. granted*, 46 U. S. L. W. 3803 (No. 77-926, July 3, 1978)). And, as *Cannon* and *Cohen III* (App. I, at 39a) hold, "even assuming financial aid and assistance by the State *in whatever amounts*, such aid and assistance is insufficient for jurisdiction under § 1983" (emphasis added).

Cannon and the instant suit are companion cases on the § 1983 issue. *Cohen I* was held "fully dispositive of [the] § 1983 claim" in *Cannon*, 559 F. 2d at 1070, and *Cannon* is the only § 1983 precedent relied on in *Cohen III* (App. I, at 39a).

THE COURT OF APPEALS, BY REQUIRING A PLAINTIFF TO PLEAD "SPECIFIC FACTS", HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Not often does one encounter a court of appeals decision which is in direct, literal, conflict with a decision of this Court. *Cohen III* is such a case.

Cohen I carefully delineated the allegations necessary under Rule 8, FED. R. CIV. P. for pleading a complaint under § 1983, and also under § 1985(3). Petitioner's amended complaint, as *Cohen III* recognized, included the "precise language" of *Cohen I* for the § 1983 count, and correspondingly for the § 1985(3) count.

Yet *Cohen III*, without reference to Rule 8, holds (App. I, at 43a) that "specific facts" must be alleged:

> "*Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations." (App. I, at 41a).

Conley v. *Gibson*, 355 U. S. 41, 47 (1967), had similarly treated with a contention that "specific facts" must be alleged. But *Conley*, in literal contrast to *Cohen III*, held:

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."

Further, the holding below conflicts in principle with *Haines* v. *Kerner*, 404 U. S. 519 (1972), *rev'g* 427 F. 2d 71, 73 (7th Cir. 1971) and applying *Conley* to "purely conclusory statements . . . [to] show that the Defendants acting under color of

state law or in conspiracy abridged his Constitutional rights." Where the present amended complaint alleges, in response to *Cohen I*'s requirement of pleading "dependency" (App. B, at 18a), that:

> "The Defendant INSTITUTE is dependent on such State support . . . for its continued operation" —

Cohen III (App. I, at 40a) terms this "only a conclusory allegation of dependency." And where it alleges, in response to *Cohen I's* requirement of pleading "approval" (App. B, at 17a), that:

> ". . . the State . . . support [is] contingent upon the Defendants not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State . . . approval of the conduct complained of herein"—

Cohen III terms this an "insufficient 'conclusory speculation' that the continued support in the face of discriminatory conduct amounted to approval of the conduct" (App. I, at 40a).

As noted earlier, a requirement of pleading "specific facts" is particularly inappropriate to actions brought under § 1983 or § 1985(3) against otherwise-private institutions. The Seventh Circuit does not require such specificity elsewhere. *Durso* v. *Rowe*, 430 F. Supp. 49, 52 (N. D. Ill. 1977), the citation to which in *Cohen III* (App. I, at 40a) was withdrawn on petition for rehearing (App. J, at 44a), was later reversed by the Seventh Circuit (579 F. 2d 1365, 1371 (7th Cir. 1978)) for the reason that the trial court had improperly required pleading "particularized facts." The court of appeals tersely said, "That is the job for discovery." It noted:

> "If the complaint was vague or lacked detail, defendants should have filed a motion for a more definite statement under Rule 12(e), not a motion to dismiss. See 2A J. Moore, Federal Practice § 12.08 (2nd ed. 1974)."

Inexplicably, the holdings of *Conley*, and of *Haines* and *Durso*, were not applied in *Cohen III*.

THE COURT OF APPEALS HAS RENDERED A DECISION ON WHAT CONSTITUTES "STATE ACTION" UNDER 42 U. S. C. § 1983 IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTER

The various courts of appeals are sharply split as to whether a State's giving "significant" aid and support to an otherwise-private institution is, by itself, sufficient "state action" to invoke 42 U. S. C. § 1983 when the institution engages in invidious discrimination. The majority holds that it is. A minority, including *Cohen I* and *Cohen III*, imposes a further requirement: there must be a close connection, or nexus, between the State support and the discriminatory policies, conduct or acts.

This Court has held that the requirement of "state action" for § 1983 is satisfied as to an otherwise-private defendant (a) when the State and the defendant have a "symbiotic relationship" in which the State has "so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant in the challenged activity" (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961)), or (b) when "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself" (*Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1964)).

An overwhelming majority of the lower courts have adopted the "symbiotic relationship" test and its corollary that "significant" State aid and support,[8] alone and by its very nature, puts the State in cahoots with private discrimination:

8. Following the lead of Judge Friendly's dicta in *Powe* v. *Miles*, 407 F. 2d 73, 82 (2nd Cir. 1968), to the effect that there is a "peculiar offensiveness of the state's taxing all citizens for objectives from the benefits of which a particular category is arbitrarily excluded", virtually all judicial circuits, with the exception of the Third, have adopted a double standard for determining "state action." A "less onerous" test is applied where invidious discrimination is al-

(Footnote continued on next page)

First Circuit: Fortin v. *Darlington Little League Inc.*, 514 F. 2d 344 (1st Cir. 1975).

Second Circuit: Powe v. *Miles*, 407 F. 2d 73 (2nd Cir. 1968); *Coleman* v. *Wagner College*, 429 F. 2d 1120 (2nd Cir. 1970); *Grafton* v. *Brooklyn Law School*, 478 F. 2d 1137 (2nd Cir. 1973); *Wahba* v. *New York University*, 492 F. 2d 96 (2nd Cir. 1974), *cert. denied*, 419 U. S. 874 (1974); *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (2nd Cir. 1974); *cert. denied*, 420 U. S. 927 (1975); *Weise* v. *Syracuse University*, 522 F. 2d 397 (2nd Cir. 1975).

Third Circuit: Braden v. *University of Pittsburgh*, 477 F. 2d 1 (3rd Cir. 1973); *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir. 1977) (*en banc*); *Chalfant* v. *Wilmington Institute*, 574 F. 2d 739 (3rd Cir. 1978) (*en banc* 8:2 decision).

Fourth Circuit: Kerr v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U. S. 721 (1945); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963) (*en banc* 3:2 decision), *cert. denied*, 376 U. S. 938 (1964); *Sams* v. *Ohio Valley General Hospital Ass'n.*, 413 F. 2d 826 (4th Cir. 1969) (2:1 decision); *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F. 2d 638 (4th Cir. 1975).

Fifth Circuit: Hammond v. *University of Tampa*, 344 F. 2d 951 (5th Cir. 1965); *Robinson* v. *Price*, 553 F. 2d 918 (5th Cir. 1977).

(Footnote continued from preceding page.)

leged, a "more stringent" one where other rights are involved. The Third Circuit seemingly adopts the "less onerous" test for all rights, *Parks* v. *"Mr. Ford"*, 556 F. 2d 132, 153 (3rd Cir. 1977) (collecting cases from other circuits). *See also Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 190, 191 (1970) (Brennan, J., concurring and dissenting); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 373, 374 (1974) (Marshall, J., dissenting).

A strong minority, however, takes a contrary view. These apply the "close nexus" test exclusively. The minority thus requires a further allegation, and then proof, that there is a causal relationship, or "close nexus," between the State aid and the discriminatory conduct.

Those courts of appeals which have exclusively applied the "close nexus" test to State aid are:

> *Second Circuit: New York City Jaycees* v. *United States Jaycees, Inc.*, 512 F. 2d 856 (2nd Cir. 1975) (gender discrimination, Jaycees).
>
> *Third Circuit: Magill* v. *Avonworth Baseball Conference*, 516 F. 2d 1328 (3rd Cir. 1975) (gender, baseball conference).
>
> *Fifth Circuit: Golden* v. *Biscayne Bay Yacht Club*, 530 F. 2d 16 (5th Cir. 1976) (racial and religious, yacht club; *en banc* 8:5 decision), *rev'g on rehearing* 521 F. 2d 344 (5th Cir. 1975) (2:1 decision).
>
> *Seventh Circuit: Cohen I* (gender, university); *Cannon* v. *University of Chicago*, 559 F. 2d 1063 (7th Cir. 1976) (gender, medical school), *cert. granted*, 46 U. S. L. W. 3803; *Cohen III* (gender, university).
>
> *Eighth Circuit: Junior Chamber of C. of K. C., Mo.* v. *Missouri St. J. C. of C.*, 508 F. 2d 1031 (8th Cir. 1975) (gender, Jaycees; 2:1 decision).
>
> *Tenth Circuit: Jr. C. of C., Rochester, Inc., N. Y.* v. *U. S. Jaycees, Tulsa, Okla.*, 495 F. 2d 883 (10th Cir. 1974), *cert. denied*, 419 U. S. 1026 (1974) (gender, Jaycees).

In all eight cases the plaintiff lost. In seven of the eight the complaint had alleged gender-based discrimination.

These conflicts[9] came to a head in the second *Braden* case, *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir.

9. The law reviews uniformly criticize nexus as applied to State aid and support. See Yackle, "The Burger Court, 'State Action' and

(Footnote continued on next page)

1977). There, the Third Circuit, after extensive discovery and an evidentiary hearing, authorized an interlocutory appeal and twice convened *en banc* to consider "whether *Jackson* has superseded *Burton*." The court concluded that "*Burton* retains vitality," and that "*Burton* and *Jackson* stand as two models of state-action analysis."

Braden II considered at length *Cohen I*, "perhaps the most important of these [university] cases," *id.* at 964. Inasmuch as "*Cohen* [*I*] appears to have utilized the 'close nexus' test of *Jackson*," *id.* at 965, *Cohen I* was not followed.

Judge Garth concurred separately in *Braden II* ("summary judgment procedures are poorly suited for deciding state action questions," *id.* at 976). He argued that *Cohen I's* "analysis of the appropriate state action standards is exactly the same as mine and consequently at odds with the view expressed by the majority of the court," *id.* at 975.

The court below acknowledges *Braden II*, but not the conflict.

(Footnote continued from preceding page.)

Congressional Enforcement of the Civil War Amendments," 27 *Ala. L. Rev.* 479, 517 n. 158 (Fall, 1975); Note, "Legislative State Action and Indiana Private Universities", 9 *Valparaiso L. Rev.* 611, 615 (1975); Elkind, "State Action: Theories for Applying Constitutional Restrictions to Private Activity," 74 *Colum. L. Rev.* 656, 674 (1974); Note, "State Action and the United States Junior Chamber of Commerce," 43 *G. Wash. L. Rev.* 1407, 1434 (August, 1975); Note, " 'State Action' in the Seventh Circuit," 50 *Marquette L. Rev.* 809, 818 (1976).

See especially:

> "Such a requirement [of direct governmental involvement in the activity under challenge] suggests, for example, that if a southern state university could find a donor willing to endow a chair for the director of admissions, it might refuse black students with complete impunity," O'Neil, "Private Universities and Public Law," 19 *Buff. L. Rev.* 155, 160 n. 21 (1970).

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, AS TO WHETHER 42 U. S. C. § 1985(3) REACHES PRIVATE NONRACIAL CONSPIRACIES, WHICH QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; THE DECISION CONFLICTS DIRECTLY WITH DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTER

Subsequent to *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), some seventeen court of appeals decisions (and several times as many district court decisions) have treated with the issue, specifically left open in *Griffin*, of whether § 1985(3), by virtue of Section 5 of the Fourteenth Amendment, can reach a private conspiracy to discriminate which is based on a nonracial animus. The First, the Second, the Third, the Fifth (until its opinion was withdrawn as moot), the Sixth, and the Eighth Circuits have ruled in the affirmative; the Fourth, the Seventh, and the Ninth have held the opposite. These conflicts are widely recognized.[10]

This Court in *Griffin* held that 42 U. S. C. § 1985(3) could reach private conspiracies where there was an invidiously discriminatory animus, 403 U. S. at 102. But it stated the necessity

10. *Cohen I* declined to follow *Weise* v. *Syracuse University*, 522 F. 2d 397 (2nd Cir. 1975), and *Richardson* v. *Miller*, 446 F. 2d 1247 (3rd Cir. 1971), on the ground that they were "without careful consideration of the [constitutional] issue" (App. B, at 20a), and distinguished *Action* v. *Gannon*, 450 F. 2d 1227 (8th Cir. 1971) (*en banc*), and *Westberry* v. *Gilman Paper Co.*, 507 F. 2d 206 (5th Cir. 1975), *opinion withdrawn as moot*, 507 F. 2d at 216, as they involved First Amendment rights which are "often accorded special deference" (App. B, at 21a, n.33). In *Murphy* v. *Mount Carmel High School*, 543 F. 2d 1189, 1193 (7th Cir. 1975), a different panel held that, "[w]ith all respect, we are unable to discern a reasoned distinction" between the First Amendment rights of *Action* and *Westberry* and the Fourteenth Amendment rights of *Cohen I*.

See also McLellan v. *Mississippi Power & Light Co.*, 526 F. 2d 870, 880 n.20 (5th Cir. 1976) ("Much controversy has been raised") *rev'd on rehearing*, 545 F. 2d 919, 926, 927 n.32 (5th Cir. 1977) ("the circuit courts have divided;" *en banc* 9:3 decision); *Murphy* v. *Mount Carmel High School*, 543 F. 2d 1189, 1194 (7th Cir. 1976) ("our holding squarely conflicts with the position taken by the Eighth Circuit").

of "consider[ing in each case] whether Congress had constitutional power to enact a statute that imposes liability under federal law for the conduct alleged," *id.* at 103. Power was found in *Griffin* under the Thirteenth Amendment and under the federal right to travel, but this Court expressly reserved the question whether Section 5 of the Fourteenth Amendment could provide the necessary constitutional tie, *id.* at 107. It said:

> "In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.[12]"
>
> * * *
>
> "[12]See *Katzenbach* v. *Morgan*, 384 U. S. 641; *Oregon* v. *Mitchell*, 400 U. S. 112, 135 (opinion of DOUGLAS, J.), 229 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *United States* v. *Guest*, 383 U. S. 745, 761 (CLARK, J., concurring), 774 (BRENNAN, J., concurring and dissenting)."

Six circuits would probably sustain the § 1985(3) count in the original complaint. They include:

First Circuit: Harrison v. *Brooks*, 466 F. 2d 404 (1st Cir. 1971) (zoning; state action present but not relied on).

Second Circuit: Weise v. *Syracuse University*, 522 F. 2d 397 (2nd Cir. 1975) (gender, university).

Third Circuit: Richardson v. *Miller*, 446 F. 2d 1247 (3rd Cir. 1971) (whites advocating racial equality, private employment); *Phillips* v. *Trello*, 502 F. 2d 1000 (3rd Cir. 1974) (personal harassment; state action present but not relied on).

Fifth Circuit: Westberry v. *Gilman Paper Co.*, 507 F. 2d 206 (5th Cir. 1975), *opinion withdrawn as moot* 507 F. 2d at 216 (environmentalist, private employment).

Sixth Circuit: Azar v. *Conley*, 456 F. 2d 1382 (6th Cir. 1972) supporters of political candidate; state action

present but not relied on); *Cameron* v. *Brock*, 473 F. 2d 608 (6th Cir. 1973) (same); *Marlowe* v. *Fisher Body*, 485 F. 2d 1057 (6th Cir. 1973) (religion and national origin, private employment).

Eighth Circuit: Action v. *Gannon*, 450 F. 2d 1227 (8th Cir. 1971) (blacks interfering with religious observation: *en banc*); *Means* v. *Wilson*, 522 F. 2d 833 (8th Cir. 1975), *cert. denied*, 424 U. S. 958 (1976) (supporters of political candidate, Indian tribe).

Those circuits which would, or would probably, dismiss the present § 1985(3) count are:

Fourth Circuit: Bellamy v. *Mason's Stores, Inc. (Richmond)*, 508 F. 2d 504 (4th Cir. 1974) Ku Klux Klan member, private employment; separate opinion suggests that majority holds § 1985(3) is applicable to Fourteenth Amendment rights); *Doski* v. *M. Goldseker Co.*, 539 F. 2d 1326 (4th Cir. 1976) (gender, private employment).

Seventh Circuit: Dombrowski v. *Dowling*, 459 F. 2d 190 (7th Cir. 1972) (criminal lawyer, office rental);[11] *Lesser* v. *Braniff Airways, Inc.*, 518 F. 2d 538 (7th Cir. 1975) (airline passenger; dicta); *Cohen I* (gender, university); *Murphy* v. *Mount Carmel High School*, 543 F. 2d 1189 (7th Cir. 1975) (racial and gender, religious high school); *Cohen III* (gender, university).

Ninth Circuit: Lopez v. *Arrowhead Ranches*, 523 F. 2d 924 (9th Cir. 1975) (citizens and legally-admitted farm workers, private employment).

11. *Dombrowski*, the earliest of the decisions in this category, has been termed both "the best judicial discussion available of the question whether Section 5 of the fourteenth amendment empowers Congress to regulate private action," *Britt* v. *Suckle*, 453 F. Supp. 987, 1001 n.24 (E. D. Tex. 1978), and one which "unnecessarily narrow[s] the holding of *Griffin*," *Reichardt* v. *Payne*, 396 F. Supp. 1010, 1017 (N. D. Cal. 1975).

Incredible as it may seem, not one of these seventeen decisions has discussed *Katzenbach* v. *Morgan* and its progeny.[12]

Three perceptive district courts have explored the reach of § 1985(3) in light of the *Morgan* line of cases. *Commonwealth of Pennsylvania* v. *Local Union No. 542*, 347 F. Supp. 268, 291-99 (E. D. Pa. 1972) (Higginbotham, J.), sees these as making § 1985(3) applicable to private non-racial conspiracies. *Baer* v. *Baer*, 450 F. Supp. 481, 492-95 (N. D. Cal. 1978) (Spencer Williams, J.), finds otherwise. *Britt* v. *Suckle*, 453 F. Supp. 987, 999 (E. D. Tex. 1978) (Justice, J.), seemingly favors the expansive view but in the end relies on the Seventh Circuit's *Dombrowski* and *Cohen I* which do not mention *Morgan et al.*

This issue has received the attention of many legal commentators and is the subject of extensive scholarly opinion and dispute.[13] We have set forth in the margin a listing, not warranted to be complete, of law review articles and notes on the controversy. If there is any consensus, it is that expressed by one

12. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 438, 439 (1968); and *Oregon* v. *Mitchell*, 400 U. S. 112 (1970). See also *District of Columbia* v. *Carter*, 409 U. S. 418, 424 n.8 (1973) ("This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment.")

13. Hemphill, "State Action and Civil Rights," 23 *Mercer L. R.* 519 (1972); Estreicher, "Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments," 74 *Colum. L. Rev.* 449 (1974); Orloski, "The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power", 40 *St. John's L. Rev.* 493 (1975); Roth, "Private Interference with an Individual's Civil Rights: A Redressable Wrong under § 5 of the Fourteenth Amendment?" 51 *Notre Dame Lawyer* 120 (1975); Yackle, "The Burger Court, 'State Action' and Congressional Enforcement of the Civil War Amendments," 27 *Ala. L. Rev.* 479 (1975); Note, "Absent State Involvement, Right of Association Not Protected by 42 U. S. C. § 1985(3)," 9 *Richmond L. Rev.* 753 (1975); Note, "Defining the Scope of the Enforcement Clause of the Fourteenth Amendment—*Murphy* v. *Mount Carmel High School*," 36 *DePaul L. Rev.* 682 (1977); Note, "Private Conspiracies to Violate Civil Rights; *McLellan* v. *Mississippi Power & Light Co.*," 90 *Harv. L. Rev.* 1721 (1977).

author[14] that the issue is still open before this Court "and invites a definitive response."

CONCLUSION

In the abstract, there may be merit in IIT's suggestion that plaintiff should "assert . . . [her] federal agency claims". But HEW has not even taken the first step toward enforcing an agency complaint filed in 1971.[15]

Perhaps also there may be merit, in the abstract, in the Second Circuit's often quoted statement:

> "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision." *Faro* v. *New York University*, 502 F. 2d 1229 (2nd Cir. 1974).

But, as that Circuit has recently said, in recanting *Faro:*

> "The pervasive nature of discriminatory university employment practices has been well documented in the literature, and was characterized in the Congressional debates preceding the passage of the 1972 amendments as 'truly appalling,' 'gross' and 'blatant.'
>
> "It is clear beyond cavil, then, that the Congress has evidenced particular concern for the problem of employment bias in an academic setting. Indeed, it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias."

14. Note, "Absent State Involvement, Right of Association Not Protected by 42 U. S. C. § 1985(3)" 9 *Richmond L. Rev.* 753 (1975).

15. "Clearly, the promise of equal employment opportunity has not been achieved in institutions of higher education; HEW's failure to enforce the Executive orders has played no small role in frustrating this objective." United States Commission on Civil Rights, "The Federal Civil Rights Enforcement Effort—1974," Vol. III, p. 305. "To Insure Equal Education Opportunity," (January, 1975).

> *Powell* v. *Syracuse University*, 580 F. 2d 1150 (2nd Cir. 1978) (Footnotes omitted).

In the last analysis, civil rights plaintiffs must look to the courts. And the doors of the courthouse should not be closed by technical pleadings requirements.

We believe that this Count can, by reason of the direct conflict between *Cohen III* and *Conley* v. *Gibson*, grant certiorari and reverse summarily. In the interest of economy of its time, this Court may wish to do so.

We urge, however, that it reach the substantive issues presented under 42 U. S. C. § 1983 and under 42 U. S. C. § 1985 (3).

In either event, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

Petitioner

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, AN ILLINOIS NOT-FOR-PROFIT CORPORATION, JAMES J. BROPHY, JOHN T. RETTALIATA, AND MAYNARD P. VENEMA,

Respondents.

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INDEX TO APPENDIX.

PAGE

Appendix A—Decision of the District Court, Dated October 29, 1974 ..... 1a-6a

Appendix B—Opinion of the Court of Appeals (*"Cohen I"*), Dated October 28, 1975 ..... 7a-22a

Appendix C—Opinion of the Court of Appeals, Dated November 26, 1975 ..... 23a-24a

Appendix D—Order of the Court of Appeals, Dated May 3, 1976 Denying Motion for Leave to File a Motion to Amend the Complaint in the District Court 25a

Appendix E—Order of the District Court, Dated October 20, 1976 Denying Motion for Leave to Amend Complaint 26a

Appendix F—Order of the Court of Appeals (*"Cohen II"*), Dated December 9, 1976 Granting Leave to File Instanter the Petitioner's Reply to Respondent's Answer to Petition for Writ of Mandamus; Granting Petition for Writ of Mandamus and Denying Respondent's Motion for Attorneys' Fees and Costs 27a-28a

Appendix G—Decision of the District Court, Dated March 25, 1977 .....29a-31a

Appendix H—Order of the Court of Appeals, Dated June 28, 1977 Denying Suggestion for Hearing In Banc ..32a-33a

Appendix I—Opinion of the Court of Appeals (*"Cohen III"*), Dated August 2, 1978 .....35a-42a

Appendix J—Order of the Court of Appeals, Dated August 28, 1978 Denying Petition for Rehearing and Suggestion for Rehearing In Banc 43a-44a

Appendix K—Letter Dated January 9, 1974 to Dr. Helen Cohen from Department of Health, Education, and Welfare 45a-49a

Appendix L—Letter Dated August 25, 1976 to Dr. Helen Cohen from Department of Health, Education, and Welfare 50a-54a

APPENDIX A.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 1374

HELEN A. COHEN,

Plaintiff,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, et al.,

Defendants.

DECISION

Defendants have filed a motion to dismiss the complaint for failure to state a claim. The complaint alleges in substance that the plaintiff was deprived of tenure and pay as an associate professor because of her sex, in violation of her rights under the Fourteenth Amendment to the Constitution of the United States. The complaint is in three counts, Count I for damages and other relief under 42 U.S.C. § 1983, Count II for damages and other relief under 42 U.S.C. § 1985(3), and Count III as a pendent claim for damages and other relief under the Illinois Constitution of 1970. We find and conclude that the defendants' motion should be granted.

The complaint does not allege the equivalent of state action within the meaning of § 1983, as applied in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Plaintiff alleges that the following circumstances in effect make I.I.T. the *alter ego* of the State of Illinois (par. 8 of the Complaint):

> (a) I.I.T. is organized under an Illinois statute which directs the Superintendent of Public Instruction to issue and revoke its certificate to operate in the State.

No doubt this same regulatory duty is required of the Superintendent with respect to all private educational institutions in Illinois, but it does not follow from this that such institutions are thereafter engaging in state actions in everything which they do.

Furthermore, in this particular case, the several requirements allegedly imposed by the Superintendent of Public Instruction as a condition for a certificate do not concern the hiring or tenure of teachers. Therefore it cannot be said that the State of Illinois controls or is responsible for the actions of I.I.T. toward the plaintiff within the meaning of *Burton v. Wilmington Parking Authority*, supra.

(b) By its name, the Institute implies that it is part of the University system of the State of Illinois. This alleged implication certainly does not make I.I.T. an agency of the State.

(c) The Superintendent of Public Instruction has delegated the accreditation of curricula and faculties to the North Central Association of Colleges and Secondary Schools, which thereupon accredits I.I.T. This allegation adds nothing to support subparagraph (a) above, except possibly to raise the question of the lack of a necessary party.

(d) I.I.T. (not the State of Illinois) requires a State of Illinois Teacher's Certificate in order for a student to participate in certain of its academic programs.

(e) The State of Illinois "controls" certain undergraduate programs at I.I.T., including some in plaintiff's department, as a condition for training and certifying secondary school teachers.

(f) The State of Illinois "controls" certain other programs at I.I.T. which lead to a degree of Bachelor of Science.

(g) The State of Illinois (and the City of Chicago) control certain undergraduate programs for training and certification of secondary school teachers.

(h) Graduate students at I.I.T. participate in mental health internships with various state agencies of the State of Illinois as part of their academic training.

(i) I.I.T. conducts seminars in cooperation with the State of Illinois (although this is not alleged to involve the plaintiff's department).

(j) At least one program at I.I.T. is established to conform to the requirements of psychological internship in the public schools of Illinois in order to meet the State requirements for certification as a school psychologist.

(k) Certain courses at I.I.T. conform to the entrance requirements of some of the graduate schools of the University of Illinois.

(l) I.I.T. conducts programs for the State of Illinois' certified teachers.

(m) I.I.T. administers the State Scholarship Program and other State financial aids to students.

(n) I.I.T. "solicits" the power of eminent domain for the acquisition of real property.

We assume that plaintiff could prove all of these allegations. It is obvious from the foregoing summarization that I.I.T. cooperates with the State of Illinois and is dependent upon its approval in many respects. This does not make it a State institution or agency with respect to the tenure and salary of its academic staff, however. In fact, plaintiff does not allege State involvement in any of the personnel practices complained of. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the court said at p. 173:

> The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services included such necessities of life as electricity, water, and police and fire protection, such a holding would

> utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

The Seventh Circuit has taken an equally restrictive view of this jurisdictional limit of § 1983 in *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973).

A case similar to the one at bar is *Furumoto et al. v. Lyman et al.*, 362 F.Supp. 1267 (N.D. Calif., 1973). In dismissing the § 1983 complaint against the president of Stanford University and others, the court summarized its reasons at pages 1278-9, as follows:

> A finding of general state action here would require more than an accumulation of the state benefits or regulations cited by plaintiffs. These factors do not establish state control or the inherently governmental nature of the university. Plaintiffs have not demonstrated that Stanford is controlled by the State of California or that Stanford does not have a substantial sphere of private, independent authority and initiative. The State's grant to Stanford of corporate powers and privileges is not evidence of State control. The State has thus merely given Stanford substantially the same corporate powers and privileges given to any corporation formed under its laws . . . . Nor can plaintiffs find support in the power granted Stanford by legislation to charge tuition to California residents. California Educational Code § 30021. The tax exemptions granted to Stanford extend also to many other nonprofitmaking institutions . . . . . These exemptions and the power of eminent domain are indeed benefits accorded Stanford by the State, but the legislature is thereby promoting what it views to be the public interest in the existence of private educational institutions. Even if the State directly subsidized the University, this financial aid would not necessitate a finding of State control.

With the corporate defendant out of the case, the allegations of Count I against the individual defendants amount to nothing more than that they "knew or should of known" of certain allegedly discriminatory acts against the plaintiff. The individual defendants were officers or directors of the corporate defendant but are not alleged to have controlled it or to have personally committed acts of discrimination, except in conclusory and vague terms (pars. 13, 14 and 15 of the complaint). Allegations of this sort are not deemed to be true for the purpose of this motion, and the plaintiff must point her finger more directly toward the individuals responsible for the acts of alleged discrimination before she can require them to defend. Cf. *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971).

Count II must fall for much the same reason. Under the controlling decision of *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) the court held that § 1985(3) requires (a) "state action" and (b) a conspiracy by two or more separate individuals, as distinguished from the "collective judgment of two or more executives of the same firm" (459 F.2d at p. 196). The allegations of Count II fail to satisfy both of these requirements. Not only is the element of state involvement lacking, as discussed above under Count I, but also the challenged conduct is essentially the act of a single entity.

Count III, being pendent, must fall with the other two. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

We are well aware of the general policy of the Federal courts not to dismiss a complaint if the plaintiff could possibly prove some set of facts under the pleadings which would entitle her to relief. *Burns v. Paddock*, 503 F.2d 18, (7th Cir., 1974). However, she must first allege these facts or at least a foundation for proving them and not rely upon the Court or the defendants to speculate concerning what she might be able to prove. She has a right to try to allege a cause of action by amendment,

but the facts and conclusions which she has chosen as a basis for her present complaint are insufficient to put any of the defendants to a trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendants to dismiss the complaint is granted.

ENTER:

/s/ THOMAS R. MCMILLEN

Judge, U.S. District Court

DATED: October 29, 1974

APPENDIX B.

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1930

HELEN A. COHEN,

Plaintiff-Appellant,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 C 1374
THOMAS R. MCMILLEN, *Judge*

ARGUED APRIL 4, 1975 — DECIDED OCTOBER 28, 1975

Before MCALLISTER, *Senior Circuit Judge,** and SWYGERT and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* This is the first case in which this circuit has been asked to decide whether the executives of a private university, which allegedly discriminated against women in the appointment, retention and compensation of its faculty, were acting under color of state law within the meaning of 42 U.S.C. § 1983[1] or were partici-

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* Senior Circuit Judge Thomas F. McAllister of the United States Court of Appeals for the Sixth Circuit is sitting by designation.

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

pating in a conspiracy prohibited by § 1985(3).[2] The appeal is from an order dismissing a complaint alleging detailed facts which we assume to be true.

For five years, commencing in the fall of 1966, plaintiff served as an Assistant Professor in the Department of Psychology and Education of the Illinois Institute of Technology ("I.I.T."). In March of 1969, and in 1970 and 1971 as well, the head of her department recommended that she be promoted to Associate Professor, a tenured position. Every year this recommendation was denied for no stated reason. Plaintiff alleges that each "denial was in fact based solely on Plaintiff's being a woman."

In March of 1971, defendant Rettaliata, the President of I.I.T., advised Dr. Cohen that she would not be offered a tenured appointment, and therefore the ensuing year would be her last. Unwilling to continue in an untenured status, plaintiff resigned and requested a statement of reasons for refusing to grant her tenure. The chairman of her department responded that he "frankly did not know," and reiterated his own belief, and that of her faculty colleagues, that plaintiff was indeed entitled to tenure on the basis of her fine record with the Institute. A further request for a statement of reasons appears to have gone unanswered.

In August of 1971, plaintiff filed a complaint with the Department of Health, Education and Welfare. After an investigation, the Regional Civil Rights Director reported that there was reasonable cause to conclude "that Dr. Cohen was discriminated against because of her sex by the Institute when it paid her less than the average salary of similarly situated males," and also cause to believe that she was "terminated in part because of her sex."

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[2] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

* * *

"in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators."

Plaintiff commenced this action against I.I.T., its former President, its Academic Vice President, and the Chairman of its Board of Trustees in May of 1974. She has alleged three alternative theories of recovery, under § 1983, under § 1985(3), and under the equal protection guarantees contained in the Illinois Constitution.[3] Because of the timing of the alleged discrimination, she has no remedy under either Title VII of the Federal Civil Rights Act of 1964, as amended,[4] or the Illinois Fair Employment Practices Act,[5] although the victim of comparable discrimination occurring today would clearly have a remedy under either of those statutes.

The district court held that Count 1 of the complaint was insufficient because I.I.T. is not a state institution and the complaint failed to allege state involvement in any of the discriminatory personnel practices; Count II was insufficient both because of the failure to allege state action and also because the alleged determination of policy by I.I.T. and its executives was not a "conspiracy" within the meaning of § 1985(3). Since there was no

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[3] Ill. Const. art. I, §§ 1, 2, 17, 18 (1970).

[4] Title VII of the 1964 Civil Rights Act originally exempted from its coverage

"an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

Pub. L. No. 88-352 § 702, 78 Stat. 255 (1964). *See* 42 U.S.C. § 2000e-1 (1970). This exemption was deleted, effective March 24, 1972, by § 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). *See* 42 U.S.C. § 2000e-1 (Supp. II 1972). Each of the challenged I.I.T. actions took place before this effective date; the 1972 amendments have been held not to apply retroactively. *Weise v. Syracuse University*, Nos. 74-1977, 74-2092, at 4760-4763 (2d Cir., July 14, 1975).

Nor does Cohen have a private cause of action under Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.), as amended by Exec. Order No. 11375, 3 C.F.R. 684 (1966-1970 Comp.), which prohibit sex discrimination by federal contractors. *Stevens v. Carey*, 483 F.2d 188, 190 (7th Cir. 1973). Thus, while a "Report of the Investigation" issued by the Department of Health, Education and Welfare in January, 1974, may be admissible in evidence, see Fed.R.Evid. 803(8), it cannot give rise to an independent private cause of action.

[5] The prohibition in the Illinois Fair Employment Practices Act, Ill. Rev. Stat. 1973, ch. 48, §§ 851-867, against sex discrimination did not become effective until August 27, 1971. P.A. 77-1342, § 1. Ill. Rev. Stat. 1973, ch. 48, § 853(a). No challenged actions took place after that date.

independent basis for federal jurisdiction of Count III, it was dismissed without consideration of its sufficiency.[6]

I.

As this case comes to us, we must assume that defendants have discriminated against plaintiff solely because she is a female and, further, that there is no rational basis for a classification of faculty members by sex. If the conduct of the defendants is "state action," they have violated Dr. Cohen's constitutionally protected right to the equal protection of the laws.[7] On the other hand, unless the requisite state involvement has been alleged, the complaint does not state a claim actionable under § 1983. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172.

To support the proposition that defendants acted under color of state law, plaintiff has made detailed allegations which may be considered in four parts: first, by using the word "Illinois" in its name, I.I.T. has, in effect, held itself out as a state instrumentality;[8] second, I.I.T. has received financial and other support from the state;[9] third,

[6] The district court opinion is reported at 384 F.Supp. 202 (N.D. Ill. 1974).

[7] The Fourteenth Amendment to the United States Constitution provides, in part:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

See Reed v. *Reed*, 404 U.S. 71.

For purposes of decision, we refer only to plaintiff's Federal Constitutional claim of a denial of equal protection. We need not separately consider her due process claim because the state action analysis is the same for that claim as for her equal protection claim.

[8] "(b) the Defendant INSTITUTE deliberately selected an institutional name which includes the name of the State of Illinois and was patterned after the names of Institutes of Technology of other states, which Institutes are formally a part of the university systems of those respective states, thereby, upon information and belief, intending to imply, and implying, that the Defendant INSTITUTE is formally a part of the university system of the State of Illinois and under the control thereof; . . . ."

[9] "(h) graduate students in the programs in counseling psychology and in rehabilitation counseling of the Department of Psychology and Education of the Defendant INSTITUTE intern or participate in practica at State of Illinois mental health centers, rehabilitation centers, and similar State agencies, during which internships and practica the students work in, are paid (directly or indirectly) by, and are under direct control of the respective State agencies;

"(i) the Defendant INSTITUTE, through its Metropolitan Studies Center, conducts seminars in cooperation with, and utilizing speakers provided by, the State of Illinois and its agencies;

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I.I.T. is pervasively regulated by the state;[10] and fourth,

[9] (Continued)

"(m) the Defendant INSTITUTE administers, subject to the direct control of the State of Illinois, the State Scholarship Program, the State Grant Program, and the State Guaranteed Loan Program;

"(n) the Defendant INSTITUTE solicits the power of eminent domain of the State of Illinois and of various agencies thereof for the acquisition of real property in the environs of said INSTITUTE, said real property to be conveyed to said INSTITUTE, the continued acquisition of such property being dependent on the continued relationship between the State and the INSTITUTE."

[10] "(a) Defendant INSTITUTE is organized and exists under the laws of the State of Illinois, including Chapter 144, Illinois Revised Statutes, §§ 1-17 and §§ 121-135, which sections, *inter alia*, direct the Superintendent of Public Instruction to: (A) examine all so-called privately-operated colleges, junior colleges and universities in the State prior to authorizing a certificate of approval necessary to operate in the State, to ascertain, *inter alia* (i) that each course of instruction to be offered or given is adequate, suitable, and proper, (ii) that the fees to be charged for the courses of instruction are reasonable, (iii) that an adequate physical plant and adequate facilities are provided, and (iv) that the members of the teaching staff are adequately prepared to fulfill their instructional obligations; (B) revoke such certificate for violation of any of the foregoing conditions; (C) make and adopt such rules as, from time to time, he deems necessary; and (D) revoke such certificate of approval for failure to comply with any of the rules adopted by said Superintendent.

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"(c) the Superintendent of Public Instruction of the State of Illinois has, by rule, delegated the accreditation of the curricula, facilities, and faculties of colleges and universities in the State of Illinois to the North Central Association of Colleges and Secondary Schools, which Association does in fact accredit the Defendant INSTITUTE, such accreditation (or lack thereof) being therefore the approval (or disapproval) of the State of Illinois;

"(d) the Defendant INSTITUTE has made admission into numerous academic programs, including that leading to the Master of Science in Teaching degree, contingent on the student's holding a State of Illinois Teacher's Certificate;

"(e) the State of Illinois, through the Illinois State Teacher Certification Board, approves—and by such approval (or lack thereof) controls—at least twelve undergraduate programs at the Defendant INSTITUTE, including programs in psychology in the Department of Psychology and Education for the training and certification of secondary school teachers; and pursuant to regulations of said Board, the Defendant INSTITUTE has established the quantity and content of courses necessary for such certification;

"(f) the State of Illinois, through the Illinois State Teacher Certification Board, approves—and by such approval (or lack thereof) controls—at least eight programs at the Defendant INSTITUTE leading to a degree of Bachelor of Science in Liberal Arts;

"(g) the State of Illinois and the City of Chicago, a municipality thereof, accredit—and by such accreditation (or lack thereof) control—the undergraduate program in the Department of Psychology and Education for the training and certification of secondary school teachers;

• • •

"(j) at least one program in the Department of Psychology and Education of the Defendant INSTITUTE is established, and

it has failed to take affirmative action to prevent I.I.T. from using gender as a criterion for faculty compensation and promotion.[11] The complaint, however, contains no allegation that any State instrumentality has affirmatively supported or expressly approved any discriminatory act or policy, or even had actual knowledge of any such discrimination.

The facts that I.I.T. was chartered by the State and includes the word "Illinois" in its title do not lend any support to the claim that I.I.T. acts under color of state law. Every private corporation, whether profitable or charitable, is chartered by the State; unless the charter contains a special authorization or directive to engage in the challenged conduct, the fact that it is granted by the State is of no significance.[12] The use of the State's name gives rise to an appearance of State involvement in I.I.T.'s activities, but, again, unless the appearance of state support either facilitates the activity in question,[13] or provides evidence that the institution is, in fact, a State instrumentality,[14] it is of no relevance. Plaintiff has not alleged that either the charter or the name of I.I.T. has any connection with the school's personnel policies.

The State of Illinois provides support for I.I.T. in various ways. The Institute may benefit from the State's eminent domain powers;[15] its students are allowed to use the facilities of various state agencies in certain study programs; its students receive financial support in the form of loan guarantees and scholarships; and, under the State Grant Program, funds are provided directly to the school.[16] At most, however, the funds contributed by the

[10] (Continued)

from time to time is altered, to conform to the requirements of psychological internship in the public schools of Illinois and to meet the requirements of the State of Illinois for certification as a school psychologist;

"(k) programs in the College of Liberal Arts of the Defendant INSTITUTE are established, and from time to time are altered, to conform with the entrance requirements of the University of Illinois Graduate Schools of Medicine, Dentistry, Veterinary Medicine, and Law, and with the regulations of the Illinois State Teachers Certification Board;

"(l) the Defendant INSTITUTE, through its Center for Educational Development, conducts programs for the State of Illinois certified teachers; . . . ."

[11] There is no specific allegation in the complaint relating to the State's failure to act, but plaintiff has argued that the omission of any prohibition against sex discrimination in regulations as detailed as those applicable to I.I.T. is tantamount to implied approval.

In addition to the allegations referred to in the text and the immediately preceding footnotes, plaintiff has alleged that I.I.T. "through its Center for Educational Development, conducts programs for the State of Illinois certified teachers." Para. 3(1). We do not believe this allegation adds any weight to the state action contention.

[12] In *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968), Judge Friendly stated at p. 80:

"To be sure, on a strictly literal basis, whatever Alfred University does is 'under color of' the New York statute incorporating it. But this is also true of every corporation chartered under a special or even a general incorporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far."

[13] Relying on Mr. Justice Brennan's separate opinion in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 211-213, plaintiff argues that a mere appearance of state involvement even without any actual substance, would satisfy § 1983's "under color of" requirement. This is not a fair reading of Mr. Justice Brennan's opinion. As he stated:

"To understand how that language applies to private persons, it is helpful to consider its application to state officials. In other legal usage, the word 'color,' as in 'color of authority,' 'color of law,' 'color of office,' 'color of title,' and 'colorable,' suggests a kind of holding out and means 'appearance, semblance, or simulacrum,' but not necessarily the reality. See H. Black, Law Dictionary 331-332 (rev. 4th ed. 1968). However, as the word appears in § 1983, it covers both actions actually authorized by a State . . . and misuse of state authority in ways not intended by the State. . . . Thus, a public official acting by virtue of his official capacity always acts under color of a state statute or other law, whether or not he overtly relies on that authority to support his action, and whether or not that action violates state law. A private person acts 'under color of' a state statute or other law when he, like the official, in some way acts consciously pursuant to some law that gives him aid, comfort, or incentive, . . . or when he acts in conjunction with a state official. . . ."

[14] The reference to the name of the New York State College of Ceramics in *Powe* v. *Miles*, 407 F.2d at 82, was to evidence that the college was in fact a state institution; Judge Friendly did not suggest that a mere appearance of authorization would provide a substitute for the actual fact.

[15] *See Grafton* v. *Brooklyn Law School*, 478 F.2d 1137, 1141-1142 (2d Cir. 1973); *Furomoto* v. *Lyman*, 362 F.Supp. 1267, 1278-1279. *But see Racklin* v. *University of Pennsylvania*, 386 F.Supp. 992, 1001 (E.D. Pa., 1974). Of course, state action might well be found to exist if I.I.T. was actually empowered by the state to exercise the power of eminent domain, rather than merely receiving the benefits of the state's use of that power. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352-353.

[16] Ill. Rev. Stat. 1973, ch. 144, § 1333.

State represent only a small fraction of the cost of educating the students for whom the grants are paid.[17]

Two different conclusions may be drawn from the allegations relating to the State's support of I.I.T. First, it is plain that the school is not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities.[18] It would dramatically enlarge the state action concept to conclude that these facts are sufficient to require a complete surrender of a university's private character.[19] On the other hand, it is equally clear that the State's support of I.I.T. is sufficiently significant to require a finding of state action if that support has furthered the specific policies or conduct under attack. Again, however, there is no allegation in the complaint that the various forms of assistance given to I.I.T., or to its students, by the State, have had any impact whatsoever on the ability of Dr. Cohen, or any other member of her sex, to be treated impartially by the administration of the Institute. The State has lent significant support to I.I.T.; it is not, however, alleged to have lent any support to any act of discrimination.[20]

[17] The State Grant Program provides for the payment of grants for Illinois residents enrolled in I.I.T. to a maximum extent of $100 or $200 per student.

[18] In contrast, the financial contributions by the state to the University of Louisville ("substantial financial support"), *Brown* v. *Strickler*, 422 F.2d 1000, 1001 (6th Cir. 1970); Temple University (up to 54.2% of the school's operating income), *Isaacs* v. *Board of Trustees of Temple University*, 385 F.Supp. 473, 479 (E.D. Pa. 1974); and the University of Pennsylvania (25% of the University's "hard core" budget), *Racklin* v. *University of Pennsylvania*, *supra* n. 15, at 996-998, where sufficient state involvement was found, were significantly greater than that which could possibly be proven here. Nor is the extent of the state contributions sufficiently in doubt so as to require a reversal of the dismissal of the complaint, as was the case in *Weise* v. *Syracuse University*, Nos. 74-1977, 74-2092, at 4754 (2d Cir., July 14, 1975), and *Braden* v. *University of Pittsburgh*, 477 F.2d 1, 6 (3rd Cir. 1973).

[19] Dr. Cohen correctly notes that in *Grafton* v. *Brooklyn Law School*, *supra* n. 15, Judge Friendly stated that the $400 per student contributed by the State of New York to the school might be sufficient to demonstrate sufficient state participation if racial discrimination were the challeged private activity. 478 F.2d at 1142. We have no occasion to rule on the "facts and circumstances" surrounding the state involvement calculus in such a case. We simply conclude here that the amounts allegedly paid to I.I.T. by the State of Illinois do not demonstrate, in Judge Friendly's words, that "the wholly state supported activity is so dominant that the private activity could be deemed to have been swallowed up." *Powe* v. *Miles*, *supra* n. 12 at 82.

The same analysis is applicable to the allegations describing the State's comprehensive regulation of the Institute. The regulation encompasses a wide variety of matters, from physical plant to course content and faculty qualifications. It is settled, however, that the mere existence of detailed regulation of a private entity does not make every act, or even every regulated act, of the private firm, the action of the State.[21] Unless it is alleged that the regulatory agency has encouraged the practice in question, or at least given its affirmative approval to the practice, the fact that a business or an institution is subject to regulation is not of decisive importance.[22]

Plaintiff's extensive allegations describing the State's many controls over I.I.T. need not be separately discussed; for in none is there any suggestion that the State of Illinois, or any agent or agency of the State, has affirmatively encouraged or approved faculty employment discrimination on the basis of gender.[23]

Finally, we are not persuaded that the omission of any affirmative prohibition against sex discrimination, even against the background of detailed State regulation of

[20] *Cf. Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756, 761 (7th Cir. 1973):

> "There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation."

[21] *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177; *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350.

[22] *Compare Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, which the Court recently described as a situation "where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, . . ." *Moose Lodge No. 107*, *supra*, 407 U.S. at 175-176, n. 3.

[23] The relevant allegations are quoted in full in notes 9, 10 and 11, *supra*. The three aspects of the State regulation that most directly connect the State of Illinois with the employment-tenure policies of I.I.T. are these. First, plaintiff notes that the Superintendent of Public Instruction is required to examine I.I.T., prior to the issuance of a

the Institute, is tantamount to express State approval of the objectionable policy. The holding of the Supreme Court in *Moose Lodge No. 107* v. *Irvis, supra,* requires us to reject such an argument. For it is abundantly clear that the State of Pennsylvania had ample power to revoke the liquor license of Lodge No. 107, and further that the State could not constitutionally endorse the Lodge's discriminatory practices. If a State's mere failure to prohibit could be equated with express approval, the *Moose Lodge* case would have been decided differently.[24]

The facts set forth in the complaint do not support the conclusion that defendants acted under color of state law

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[23] (Continued)

certificate of approval, to ascertain "That the members of the teaching staff are adequately prepared to fulfill their instructional obligations." Ill. Rev. Stat. 1973, ch. 144, § 124(4). To carry out the purposes of the act requiring such an ascertainment, the Superintendent is empowered to adopt rules and regulations. *Id.*, § 134.

Second, plaintiff alleges that the Superintendent, by rule, has delegated the accreditation of curricula, facilities, and faculties of Illinois colleges and universities to the North Central Association of Colleges and Secondary Schools, which has in fact granted accreditation to I.I.T.

Finally, plaintiff notes that, as a precondition to its participation in the State Grant Program discussed above, I.I.T. must "possess and maintain an open policy with respect to race, creed and color as to admission of students, appointment of faculty and employment of staff." Ill.Rev.Stats. 1973, ch. 144, § 1333(3).

[24] We have not overlooked plaintiff's argument that I.I.T., in providing higher educational services, is engaged in a traditionally public function. As plaintiff recognizes, this argument has been routinely rejected by the courts in private college and university cases. *See Blackburn* v. *Fisk University*, 443 F.2d 121, 124; *Browns* v. *Mitchell*, 409 F.2d 593, 596 (10th Cir. 1969); *Powe* v. *Miles, supra* n. 12, at 80; *Pendrell* v. *Chatham College*, 370 F.Supp. 494, 497 (W.D.Pa. 1974); *Furomoto* v. *Lyman, supra*, n. 15, at 1277; *Bright* v. *Isenbarger*, 314 F.Supp. 1382, 1398 (N.D. Ind. 1970), *aff'd* 445 F.2d 412 (7th Cir. 1971); *Grossner* v. *Trustees of Columbia University*, 287 F.Supp. 535, 549 (S.D.N.Y. 1968); *Contra, Belk* v. *Chancellor of Washington University*, 336 F.Supp. 45, 49 (E.D.Mo. 1970).

Dr. Cohen argues, however, that the State of Illinois has declared higher education to be a public function in the preamble of the Educational Facilities Authority Act adopted in 1969, wherein it is stated that "it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities and skills. . . ." We disagree; as Judge Friendly stated in response to a similar argument concerning Alfred University in *Powe* v. *Miles, supra*, at 80:

in their discrimination against plaintiff. Nevertheless, plaintiff argues that since she has alleged the necessary ultimate conclusion in the language of the statute, the complaint should not be dismissed before she has completed discovery which may reveal some nexus between the State of Illinois and defendants' wrongful conduct. Her argument is supported by the admonition in *Conley* v. *Gibson*, 355 U.S. 41, 45-46, that dismissal is inappropriate unless it is clear beyond doubt that plaintiff can prove no set of facts in support of his claim that will entitle him to relief, and also by *Weise* v. *Syracuse University*, ... F.2d ....., No. 74-1977, No. 74-2092 (2d Cir. July 14, 1975), a faculty sex discrimination case in which the Second Circuit ordered a trial on the state action issue.

We agree that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim which she has not made. Her complaint omits any allegation of state support or approval of the defendants' discriminatory conduct, and the detailed facts set forth in the complaint, even if wholly true and liberally construed in her favor, do not warrant the conclusion that I.I.T. is a public university. It is clear beyond doubt that the claim which she has alleged does not entitle her to relief.

In the *Weise* case, the plaintiff had alleged that the University received so much public aid, both in the form of grants and in payment for services provided under

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[24] (Continued)

> "Education has never been a state monopoly in this country, even at the primary or secondary levels, and New York's entry into higher education on a significant scale came more than a century after Alfred's establishment."

Illinois' recent declaration of the importance of higher education can scarcely convert I.I.T.'s activities into "powers traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352.

There is, of course, no suggestion that I.I.T. has replaced a former public institution which was closed in order to enable its private successor to continue a forbidden discriminatory policy. *Cf. Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218.

contract, that Syracuse University was dependent on such support for its continued operation. There are no comparable allegations in Dr. Cohen's complaint.[25] We need not decide whether we would have ordered a trial of the *Weise* complaint, but we are satisfied that Count I of the pleading before us does not state a claim for relief under 42 U.S.C. § 1983.

II.

Count II of the complaint alleges that the individual defendants, perhaps in concert with other unknown individuals, conspired to have I.I.T. adopt policies or practices having the effect of discriminating against women holding faculty appointments from I.I.T., and thereby to deprive them of their Fourteenth Amendment right to the equal protection of the laws. Count II is predicated on § 1985(3), which proscribes private conspiracies to deprive a person of a constitutionally protected right.

Quite properly, Count II omits any allegation that the individual defendants acted under color of state law. For there is no statutory requirement of State participation or support for the conduct of the individual conspirators proscribed by § 1985(3).[26] There is, however, a requirement that the conspiracy deprive the plaintiff of a federally protected right. That requirement would be satisfied if I.I.T. were a State university,[27] or if the constitutional

[25] It should also be noted that in the *Weise* case the affidavit submitted by the defendants indicated that State funds constituted only 3.6% of the school's annual budget. The Second Circuit opinion indicated that if no more financial support was involved, there would be little question about the result. However, the defendants' affidavit had been controverted by the plaintiff sufficiently to raise an issue of fact requiring trial. Moreover, the *Weise* complaint alleged that federal funds had been supplied on condition that the school adopt an affirmative action hiring program designed to increase minority and female faculty representation. There was thus a greater likelihood that an evidentiary hearing would disclose state activity in the hiring area directly connected with the activity in dispute. There are no comparable allegations in the complaint before us.

[26] *Griffin* v. *Breckenridge*, 403 U.S. 88; *Dombrowski* v. *Dowling*, 459 F.2d 190, 194 (7th Cir. 1972).

[27] It is clear that a private conspiracy to cause the plaintiff to receive unequal treatment from the State, or from a State agency, would violate § 1985(3). *Cf. United States* v. *Guest*, 383 U.S. 745. As we have previously pointed out, it is a fair distillation of the four opinions filed in *Guest* to state

right of the plaintiff at stake were one that is entitled to protection against anyone, rather than merely protection from impairment by a state.[28]

The constitutional rights which were vindicated by the Supreme Court's decision in *Griffin* v. *Breckenridge*, 403 U.S. 88, were not mere prohibitions against objectionable state action. That case held that a private conspiracy to deprive the plaintiffs of their Thirteenth Amendment rights, or their right of interstate travel, was actionable under § 1985(3). Neither of those constitutional rights is merely a limitation on state power.

Thus, the Court reminded us that the Thirteenth Amendment "'is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.' *Civil Rights Cases*, 109 U.S. 3, 20. See also *id.*, at 23; *Clyatt* v. *United States*, 197 U.S. 207, 216, 218; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 437-440." 403 U.S. at 105. And the Court also emphasized "that the right of interstate travel is . . . assertable against private as well as governmental interference. *Shapiro* v. *Thompson*, 394 U.S. 618, 629-631; *id.*, at 642-644 (concurring opinion); *United States* v. *Guest*, 383 U.S. 745, 757-760 and n. 17; . . .." 403 U.S. at 105-106.

On the other hand, it is equally well settled that the Fourteenth Amendment is not a protection against purely private interference and may be violated only by the action of a state. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1, 13.[29] For that reason, we have held that a private con-

[27] (Continued)

"that, although there was disagreement within the Court on the question whether defendants' private conduct would have been proscribed if there had been no cooperative action by state officers, all members of the Court recognized the need for state involvement in the provision of facilities to which the victims of the conspiracy were denied equal access. In short, the right secured by the Equal Protection clause of the Fourteenth Amendment is a right to protection against unequal treatment by a state." *Dombrowski* v. *Dowling*, 459 F.2d at 196. (Footnote omitted.)

[28] As Judge Craven pointed out in *Bellamy* v. *Mason's Stores, Inc. (Richmond)*, 508 F.2d 504, 507, ". . . there are no Equal Protection Clause rights against wholly private action."

[29] "Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[12]" (Footnote omitted.)

spiracy to make a completely irrational discrimination between criminal lawyers and other prospective tenants of office space was not covered by § 1985(3). *Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972). The rationale of *Dombrowski* is controlling here.

We recognize, as plaintiff argues, that there is language in *Griffin* which may indicate that the statute will be construed to cover any invidiously discriminatory private conspiracy,[30] and that other circuits, without careful consideration of the issue, have stated that state action is never an element of a § 1985(3) claim.[31] We are satisfied, however, that the distinction between the two kinds of state involvement that may be relevant in civil rights litigation—first, whether the defendant has acted under color of state law, and, second, whether plaintiff's federal

[30] Plaintiff relies primarily on a passage in *Griffin* v. *Breckenridge*, *supra*, at 102, where the Court stated:

> "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[9]" (Footnote omitted.)

In note 9 the Court said:

> "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us. Cf. Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds)."

Plaintiff would read this language from *Griffin* as establishing that any private conspiracy to deny a person equal treatment because of some "class-based invidiously discriminatory animus" is actionable under § 1985(3). This interpretation overlooks, however, the fact that the Court, in this passage, was concerned solely with the motivation of the conspirators and not with the right of the complainant that was the subject of the infringement. In the next sentence after n. 9, the Court stated:

> "The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

[31] In many cases, *Griffin* is cited for the general proposition that state action is never necessary in a § 1985(3) action. *See, e.g., Weise* v. *Syracuse University*, Nos. 74-1977, 74-2092, at 4756-4757 (2d Cir., July 14, 1975); *Richardson* v. *Miller*, 446 F.2d 1247, 1249 (3rd Cir. 1971).

right is merely assertable against the State[32]—requires consideration of the state action issue in cases bottomed on an alleged violation of the Fourteenth Amendment.

We have no doubt that discrimination which is invidious because of racial motivation would be covered since the protection of the Thirteenth Amendment is not merely against state action. But since the Court in *Griffin* so carefully refrained from holding that any discrimination which would be actionable if practiced by the State is for that reason also actionable under § 1985(3), we remain convinced that our reasoning in *Dombrowski* is a correct explanation of why the statute does not broadly "apply to all tortious, conspiratorial interferences with the right of others." 403 U.S. at 101.[33]

[32] In *Dombrowski* we commented on this distinction at some length, stating, in part:

> "Although the point is sometimes obscured or overlooked, § 1983 contains two quite distinct 'state involvement' requirements. The first is clearly stated in the statute: the defendants must have acted 'under color of' state law.[7] The second inheres in the nature of plaintiff's protected rights: he may not be deprived 'of any rights, privileges, or immunities secured by the Constitution and laws.'[8] His Fourteenth Amendment right to protection against discrimination extends only to cases in which state action is involved.[9]" 459 F.2d at 194.

The footnotes quoting extensively from Mr. Justice Brennan's opinion in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 188-190, are omitted.

[33] We have not been faced with the question whether the *Dombrowski* rationale would apply to a right protected by the First Amendment which in terms is only a protection against State action, but which is often accorded special deference. The Fourth Circuit has, however, held insufficient allegations that a private conspiracy had deprived a person of his rights of association. *Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504, 506-507 (1974). There is authority to the contrary. In *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc), the court held that a private conspiracy to prevent a person from exercising his First Amendment rights is actionable under § 1985(3). 450 F.2d at 1235-1237. Similarly, in *Richardson* v. *Miller*, 446 F.2d 1247 (3rd Cir. 1971), a district court dismissal of a § 1985(3) complaint was reversed; the court held the plaintiff had stated a cause of action when he alleged he had been fired from his employment because of his criticism of his employer's racially discriminatory hiring practices.

Most recently, a Fifth Circuit panel has applied § 1985(3) to a conspiracy claim alleging that defendants had conspired to take plaintiff's life and to dismiss him from his job because of his outspoken support of environmental issues. *Westberry* v. *Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975). The panel opinion in *Westberry* has been withdrawn, however, and, thus, has no precedential value.

Because of this conclusion as to the scope of the rights protected by § 1985(3), we do not reach the issue whether a determination of policy by an institute and its executives can be a "conspiracy" within the meaning of this section.

III.

Since we have held that plaintiff's federal claims were properly dismissed, it was also proper for the district court to refuse to exercise pendent jurisdiction over the State claim.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 26, 1975

BEFORE

Hon. THOMAS F. MCALLISTER, *Senior Circuit Judge**
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 74-1930

HELEN A. COHEN,

Plaintiff-Appellant,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 C 1374
THOMAS R. MCMILLEN, *Judge*

* Senior Circuit Judge Thomas F. McAllister of the United States Court of Appeals for the Sixth Circuit is sitting by designation.

ORDER

The quality of the petition for rehearing merits a brief additional comment.

Norwood v. Harrison, 413 U.S. 455, did not involve the question whether action taken by a school, or by school officials, was under color of state law. That case involved a direct challenge to a state program under which text books were provided to students at state expense. In the case before us the plaintiff has not challenged any of the state programs which provide support to I.I.T. or to its students. *Cf. Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, 645-647 (7th Cir. 1972).

The analysis in Part II of our opinion assumed for the purpose of decision that Congress has ample power to enact a statute having the coverage urged by petitioner but concluded that § 1985(3) is not such a statute. As explained in footnote 33 of the opinion, the cases cited at page 8 of the petition for rehearing [*Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5 Cir. 1975); *Action v. Gannon*, 450 F.2d 1227 (8 Cir. 1971); *Commonwealth v. Local Union No. 542*, 347 F. Supp. 268, 287-297 (E.D. Pa. 1972)] do not conflict with our holding.

No member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing, the petition for rehearing is denied.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 3, 1976.

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. .....
HON. .....

HELEN COHEN,
Plaintiff-Appellant,

No. 74-1930 *vs.*

ILLINOIS INSTITUTE OF TECHNOLOGY, JAMES T. BROPHY, JOHN T. RETALIATA AND MAYNARD P. VENEMA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(74 C 1374)

This matter comes before the court on the "Motion for Leave to File in the District Court a Motion to Amend the Complaint" filed herein on April 20, 1976 by counsel for the plaintiff-appellant. This Court is without jurisdiction to grant the relief requested by the plaintiff-appellant in the aforesaid motion. Accordingly,

IT IS ORDERED that the motion of the plaintiff-appellant for leave to file a motion to amend the complaint in the district court is hereby DENIED for want of jurisdiction.

APPENDIX E.

UNIDED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Thomas R. McMillen

Cause No. 74 C 1374 Date October 20, 1976

Title of Cause—Helen Cohen v. Illinois Institute of Technology et al.

Enter order that this court lacks jurisdiction to grant plaintiff leave to amend in view of *Asher* v. *Harrington*, 461 F. 2d 890 (7th Cir. 1972), which holds that one appeal has been filed in the Court of Appeals, further proceedings in the district court cannot take place without leave of the appellate court. The Seventh Circuit granted no such leave to plaintiff Cohen. Her motion for leave to amend her complaint must therefore be denied.

/s/ McMillen *J.*

APPENDIX F.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted: December 8, 1976
December 9, 1976

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

No. 76-2114

HELEN A. COHEN, *Petitioner,*
vs.
HON. THOMAS R. MCMILLEN, United States District Judge for the Northern District of Illinois, Eastern Division, *Respondent.*

Original Petition for Writ of Mandamus.

On November 12, 1976 counsel for the petitioner filed herein a "Petition for Writ of Mandamus," together with numerous attachments thereto. On December 3, 1976 counsel for the Illinois Institute of Technology and other defendants in the District Court action (respondents herein) filed herein their "Respondent's Answer to Petition for Writ of Mandamus" on behalf of the respondent Judge. On December 6, 1976 counsel

for the petitioner filed herein a "Motion for Leave to File Petitioner's Reply to Respondent's Answer to Petition for Writ of Mandamus." Upon a thorough consideration of the aforesaid documents,

IT IS ORDERED that leave is hereby GRANTED to file instanter the Petitioner's Reply to Respondent's Answer to Petition for Writ of Mandamus."

IT IS FURTHER ORDERED that the aforesaid "Petition for Writ of Mandamus" is hereby GRANTED, insofar as the District Court is hereby authorized to consider and decide the petitioner's motion to amend her complaint in District Court Cause No. 74-C-1374. This Court does not hereby express any opinion regarding the merits of the petitioner's motion to amend her complaint.

IT IS ALSO FURTHER ORDERED that the respondent's motion for attorneys' fees and costs is hereby, DENIED.

APPENDIX G.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

HELEN A. COHEN, *Plaintiff*, vs. ILLINOIS INSTITUTE OF TECHNOLOGY, et al., *Defendants.*	No. 74 C 1374

DECISION

Plaintiff seeks to amend her complaint pursuant to a writ of *mandamus* granted by the Seventh Circuit Court of Appeals on December 9, 1976, following affirmance of the dismissal of her complaint by decision on October 20, 1975, rehearing denied November 26, 1975. 524 F. 2d 818 (7th Cir. 1975).

Plaintiff's motion to amend her complaint pursuant to F. R. C. P. 15(a) or 60(b) was filed April 21, 1976 and was "renewed" September 16, 1976. Her memorandum was filed on the latter date and contains the proposed amendment. Defendants have likewise filed a memorandum opposing the motion, consisting of a copy of the slip opinion in *Cannon* v. *University of Chicago*, ... F. 2d ..... (7th Cir. No. 76-1238, Aug. 27, 1976). Since the documents were filed in September and we have received no other filings in this case, we are satisfied that the plaintiff is not entitled to amend her complaint in the manner set forth in her motions or in her memorandum.

Plaintiff's proposed amendment does not overcome the deficiencies originally found in her complaint in this court (reported

at 384 F. Supp. 202) and affirmed by the Seventh Circuit in the foregoing decision. The only allegation added is:

> 8.(o) the aid and support provided by the State of Illinois, as alleged in subparagraphs (h), (i), (m), and (n) hereof, significantly supports and contributes to the effectiveness of the Defendants' conduct complained of herein. The Defendant INSTITUTE is dependent on such State support, and upon similar Federal support, for its continued operation. Both the State and the Federal support are contingent upon the Defendants' not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State and Federal approval of the conduct complained of herein.

Financial support by the State or Federal government does not make the defendant a public body, and its acts of alleged discrimination are not taken under color of law unless they are affirmatively supported or required by a State government. *Cannon* v. *University of Chicago,* ..... F. 2d ..... (7th Cir. Slip Op. 76-1238, Aug. 27, 1976). The new allegation merely alleges the condition upon which financial support is granted to the defendants, except for the conclusory speculation that this "constitutes State and Federal approval" of defendants' alleged discriminatory practices. In our opinion, this does not allege affirmative governmental support or approval of any discriminatory act of policy of defendants (524 F. 2d at 824) and, in fact, contradicts the prior reasonable allegation that government financial support is contingent upon non-discrimination.

The same jurisdictional defect applies to plaintiff's claim under § 1985(3) against the corporate defendant's officials. As was originally pointed out by the Court of Appeals at 524 F. 2d 828, the claim under this section must allege deprivation of a Federally protected right. The right if claimed, as here, under the Fourteenth Amendment, must have been interfered with by some kind of State action, which is absent in this case. *Murphy* v. *Mount Carmel High School,* 543 F. 2d 1189, 1193 (7th Cir. 1976).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion to amend the complaint in this case is denied.

Enter:

/s/ THOMAS R. MCMILLEN
Judge, U. S. District Court

Dated: Mar. 25, 1977

APPENDIX H.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 28, 1977

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*

HELEN A. COHEN, *Plaintiff-Appellant,* vs. ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-1477	No. 74-C-1374
	Thomas R. McMillen, Judge.

This matter comes before the court on the plaintiff-appellant's "Motion for Hearing in Banc" filed herein on June 20, 1977.

This court never, to the recollection of any of its members, held its initial hearing of a case *in banc* upon the suggestion of a

party. Although the occasion is rare, there is a procedure whereby if a panel of the court is persuaded that a prior decision should be overruled, the opinion taking the new position is released only after it has first circulated among the active members of the court and a majority have not voted to rehear the case *in banc*. *E.g. Stone* v. *Morris*, 546 F. 2d 730, 737 n. 9 (7th Cir. 1976).

No judge in regular active service has voted to hear this case *in banc* and all have voted to deny plaintiff's suggestion. Accordingly, the suggestion for hearing *in banc* is DENIED.

APPENDIX I.

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1477

HELEN A. COHEN,

Plaintiff-Appellant,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation; JAMES J. BROPHY; JOHN T. RETTALIATA and MAYNARD P. VENEMA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 1374—Thomas R. McMillen, *Judge.*

ARGUED JANUARY 9, 1978—DECIDED AUGUST 2, 1978

Before CASTLE, *Senior Circuit Judge*; WOOD, *Circuit Judge*; and EAST, *Senior District Judge.**

EAST, *Senior District Judge.* Plaintiff-appellant Helen A. Cohen (Cohen) appeals from the District Court's decision denying her motion to amend her civil rights complaint against the Illinois Institute of Technology, a private Illinois corporation, (IIT) and named officials on the ground that the proposed amendment failed to cure the original defect in the complaint. We affirm.

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

FACTS

Cohen, formerly an untenured assistant professor at IIT, instituted this action against IIT and certain members of the administration alleging sex discrimination in promotion and salary in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1985(3), and through pendent jurisdiction under Sections 2, 17, and 18 of the Illinois Constitution.[1] The nature of the factual background is developed in this Court's first opinion, *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), (*Cohen I*) and will not be repeated here.

On October 29, 1974, the District Court dismissed the original complaint, 384 F. Supp. 202 (N.D. Ill. 1974), against both the corporate and individual defendants primarily on the theory that Cohen had failed to allege the requisite state action. This Court in *Cohen I* affirmed. Thereafter Cohen moved this Court for leave to file an amended complaint in the District Court under Fed. R. Civ. P. 15(a) and 60(b) in an attempt to cure the complaint's defects noted in *Cohen I.* The motion was denied for want of jurisdiction.

Subsequently, Cohen moved the District Court for leave to file an amended complaint which was also denied for want of jurisdiction. Thereupon Cohen petitioned this Court and was granted a writ of manda-

[1] In 1971, after IIT repeatedly and without explanation failed to grant her a tenured position in spite of the favorable recommendations of her department head and colleagues, Cohen filed a complaint with HEW. "After an investigation, the Regional Civil Rights Director reported that there was reasonable cause to conclude 'that Dr. Cohen was discriminated against because of her sex . . . .'" *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 822 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). No Title VII action was brought, however, because the alleged discriminatory conduct took place before the 1972 amendment to the Civil Rights Act of 1964 which deleted the exemption previously extended to educational institutions. Further notwithstanding that the extension of federal aid to IIT is contingent upon nondiscriminatory conduct, HEW has not, as yet, taken any action to remedy Cohen's situation.

mus directing the District Court to consider the merits of her motion to amend her complaint. The District Court heard the parties on the merits and on March 25, 1977 denied the motion to amend on the ground that the "proposed amendment does not overcome the deficiencies originally pointed out in her complaint." Cohen appeals from that order.

ISSUE ON APPEAL

Whether the District Court properly denied Cohen's motion to amend her complaint.

DISCUSSION AND RESOLUTION

Denial of the Motion to Amend

A. *Section 1983 Claim*

In *Cohen I*, we noted that the allegations with respect to state action covered four areas: (1) a name suggestive of a state identity; (2) extensive state regulation of the school; (3) the State's failure to take affirmative steps to stop the discrimination; and (4) state financial and other support of the school. Only the scope of the District Court's ruling on the element of financial support is at issue here. In *Cohen I*, we stated that two conclusions could be drawn with respect to the allegations that the existing level of state financial support to IIT was sufficient to constitute state action. The first was that the relatively small amount of financial support extended to IIT by the State was such that "the school is not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities.[18]" Note 18 gave examples of funding levels, "significantly greater than that which could possibly be proven here," which might be sufficient; *e.g.*, 54%.[2] The second conclusion was that the

[2] Thus, *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975), and *Braden v. University of Pittsburgh*, 477 F.2d 1 (3d Cir. 1973), and 552 F.2d 948 (3d Cir. en banc 1977), presented different situations as there the extent of state contributions was in doubt, necessitating a remand.

level of state financial support to IIT "is sufficiently significant to require a finding of state action if that support has furthered the specific policies or conduct under attack." In this vein, we emphasized, however, the absence of any factual allegation in the complaint establishing that the State had "supported," "approved" or had "actual knowledge" of any alleged discriminatory conduct. 524 F.2d at 824, 825 and 826.

In short, it was held that if the private entity was not so dependent for its existence on the State so as to be considered a public entity for all purposes, then the conduct of the entity was to be considered state action only if there was a connection or nexus between the State's support and the specific conduct under attack.

To cure the defect in her complaint, Cohen sought leave to amend it by adding the following paragraph:

> "8. . . . (o) the aid and support provided by the State of Illinois, as alleged in subparagraphs (h), (i), (m), and (n) hereof, significantly supports and contributes to the effectiveness of the Defendants' conduct complained of herein. The Defendant INSTITUTE is dependent on such State support, and upon similar Federal support, for its continued operation. Both the State and the Federal support are contingent upon the Defendants' not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State and Federal approval of the conduct complained of herein."

In denying Cohen's motion to amend, the District Court held:

> "Financial support by the State or Federal Government does not make the defendant a public body, and its acts of alleged discrimination are not taken under color of law unless they are affirmatively supported or required by a State Government. *Cannon v. University of Chicago*, [559 F.2d 1063 (7th Cir. 1976)]. The new allegation merely alleges the condition upon which financial support is granted to the defendants, except for the conclusory specula-

> tion that this 'constitutes State and Federal approval' of defendants' alleged discriminatory practices. In our opinion, this does not allege affirmative governmental support or approval of any discriminatory act or policy of defendants (524 F.2d at 824) and, in fact, contradicts the prior reasonable allegation that government financial support is contingent upon non-discrimination."

IIT correctly points out that the decision as to whether to grant a motion to amend a complaint is entrusted to the sound discretion of the trial court. *Esquire Restaurant, Inc. v. Commonwealth Ins. Co. of New York*, 393 F.2d 111, 116 (7th Cir. 1968); *Kamsler v. H. A. Seinscheimer Co.*, 347 F.2d 740, 742 (7th Cir.), *cert. denied*, 382 U.S. 837 (1965). Nevertheless the hallmark of sound judicial discretion is the lawfulness of the action taken. In that vein, IIT contends that the District Court's action was lawful and correct in that (1) a party has no right to amend a complaint after a final decision has been appealed and decided on appeal; (2) the changed law and new evidence requirements of Fed. R. Civ. P. 60(b) have not been met; and (3) the substance of the proposed amendment was inadequate.

Basically Cohen argues that because this Court directed the District Court to consider and decide the merits of her motion to amend and because the content of the proposed amendment contained the precise language noted by this Court to have been missing from the original complaint, the District Court under the law of the case doctrine had no power to deny the motion to amend on the ground that it was insufficient. Cohen also argues that the requirements of Rule 60(b) have been met.

IIT's initial contention that Cohen had no right to amend because she elected to stand on her complaint and lost on appeal is without merit. Amendment in either the appellate or trial court is generally not allowed in such situations (3 Moore's Federal Practice (2d ed.) ¶ 15.11 at 967), as a contrary rule would in effect allow interlocutory appeals (*id.* at n.1). However, an amendment can be allowed with leave of the Court of Appeals.

Asher v. Harrington, 461 F.2d 890 (7th Cir. 1972); 3 Moore's Federal Practice (2d ed.) ¶ 15.11 at 967. This may be accomplished either by the appellate court itself granting leave to amend or by remanding to the District Court to consider the motion. *Id.* at 970. The practice in this Circuit ordinarily is to remand for consideration, *Asher*, 461 F.2d at 895, and in effect such action was taken in this case via the writ of mandamus.

As to IIT's second contention, we are satisfied that Cohen's failure to formally seek relief from the finality of the District Court's judgment in *Cohen I* through a channel or channels of Rule 60(b) was no bar to the District Court's consideration of Cohen's motion to amend. The issuance by this Court of the writ of mandamus directing the District Court's consideration of Cohen's motion was comparable to a vacation of the District Court's *Cohen I* judgment. *Compare* 6 Wright & Miller § 1489 at 449 and *Asher v. Harrington*, 461 F.2d at 895.

The third argument made by IIT is the same as that relied upon by the District Court, *viz.*, the substance of the proposed amendment is not sufficient to cure the defective allegation of state action. In framing the language of the proposed amendment, Cohen endeavored to come under our language in *Cohen I* stating that certain private entities could be considered public "in all [their] activities" if they were "heavily dependent on the State," 524 F.2d at 825. The other allegations sought to allege the connection required between state support and the challenged conduct for private entities not dependent on state support. *Id.*

With regard to the dependency allegation, the District Court found that "[f]inancial support by the State or Federal government does not make the defendant a public body, ..." relying on *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976), *appeal docketed*, 46 U.S.L.W. 3438 (U.S. Jan. 10, 1976) (No. 77-926). *Cannon*, presented with a similar factual setting, held "even assuming financial aid and assistance by the State in whatever amounts, such aid and assistance is insufficient for jurisdiction under § 1983 unless it can be shown that the State has 'affirmatively supported' the particular conduct challenged here." *Id.* at 1071.

In addition to the rule of *Cannon*, the new dependency allegation is still insufficient. In our 1975 opinion affirming the dismissal of the complaint, we found more than the absence of an allegation of dependency. We also found that "the amounts allegedly paid to I.I.T. by the State of Illinois do not demonstrate [the necessary dependency]." 524 F.2d at 825, n.19. Cohen has added only a conclusionary allegation of dependency; she has not alleged any additional amount of state aid. Thus, she has failed to cure this defect in her complaint.[3]

Addressing the new allegations of a connection or nexus between the state support and the discriminatory conduct, the District Court found that the new allegations merely stated the condition upon which the state support was rendered (nondiscrimination) plus the insufficient "conclusory speculation" that continued support in the face of discriminatory conduct amounted to approval of the conduct.

The controlling standard, as set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), is that an action may be dismissed for failure to state a claim only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Furthermore, a pleading is insufficient to state a claim under the Civil Rights Act if the allegations are mere conclusions. *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971); *Kennedy v. Landing*, 529 F.2d 987, 989 (9th Cir. 1976). Some particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action under the Civil Rights Act. *Kadlec v. Illinois Bell Telephone Co.*, 407 F.2d 624, 627 (7th Cir.), *cert. denied*, 396 U.S. 846 (1969); *Durso v. Rowe*, 430 F. Supp. 49, 52 (N.D. Ill. 1977). *See Cannon*, 559 F.2d at 1069; and *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971). *See also Koch v. Yunich*, 533 F.2d 80, 85 (2d Cir. 1976); *Kauffman v. Moss*, 420 F.2d 1270, 1275 & n.13 (3d Cir.),

[3] The fact that she now argues that huge amounts of federal aid go to the school is of no consequence because "the fact that there is federal support cannot be used to create § 1983 jurisdiction." *Cannon*, 559 F.2d at 1071 n.8, and cases cited therein.

cert. denied, 400 U.S. 846 (1970); *Anderson v. Sixth Judicial District Court*, 521 F.2d 420, 420-21 (8th Cir. 1975).

In *Illinois Migrant Council v. Campbell Soup Co.*, 519 F.2d 391 (7th Cir. 1975), this Court was faced with the need to make a similar determination. However, unlike the complaint now before us, appellants there alleged specific facts which constituted a sufficient claim to establish that a "residential community" maintained by the defendants was a "company town" within the meaning of *Marsh v. Alabama*, 326 U.S. 501 (1946), to warrant a finding of the requisite state action under 42 U.S.C. § 1983.

We agree with the District Court that the proposed amendment "does not allege affirmative governmental support or approval of any discriminatory act or policy of defendants."

Lastly, the District Court was not stripped of its discretionary power to deny the motion to amend the complaint because of the law of the case doctrine. *Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations. Hence, Cohen's repetition of broad conclusions without additional facts establishing that the defendants acted under color of state law in their discrimination against her is insufficient. Nothing more than general categorizations are to be found in the proposed amendment; a mere recitation of broad conclusory language misses the mark. As we fail to see how the proposed amendment escapes the deficiencies of its precursor, we hold that the amended complaint, like the original, fails to state a federal cause under 42 U.S.C. § 1983.

B. *Section 1985(3) claim*

The § 1985(3) claim was brought against several administrators and alleged that they conspired to engage in sex discrimination, thereby depriving Cohen of her

Fourteenth Amendment right to the equal protection of the laws. *Cohen I* held that normally a § 1985(3) action can reach a purely private conspiracy as long as the deprivation of a federal right was alleged. The District Court's dismissal was affirmed, as an allegation of state action is necessary where, as here, the federal right relied upon is one requiring an element of state action.

The District Court, again concluding an absence of alleged state action underlying the § 1983 claim, also denied the amendment as to the § 1985(3) claim stating:

> "The same jurisdictional defect applies to Plaintiff's claim under § 1985(3) against the corporate defendant's officials. As was originally pointed out by the Court of Appeals at 524 F.2d 828, the claim under this section must allege deprivation of a Federally protected right. The right if claimed, as here, under the Fourteenth Amendment, must have been interfered with by some kind of State action, which is absent in this case. *Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1193 (7th Cir. 1976)."

We also hold that the amended complaint, like the original, fails to state a federal cause under 42 U.S.C. § 1985(3).

The decision of the District Court denying Cohen's motion to amend the complaint and entered on March 25, 1977 is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4272—Midwest Law Printing Co., Inc., Chicago—8-2-78—275

APPENDIX J.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1978

Before

HON. LATHAM CASTLE, *Senior Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. WILLIAM G. EAST, *Senior District Judge**

HELEN A. COHEN,
Plaintiff-Appellant,

No. 77-1477 *vs.*

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation; JAMES J. BROPHY; JOHN T. RETALIATA and MAYNARD P. VENEMA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 74 C 1374

Thomas R. McMillen, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a

* Honorable William G. East, Senior United States District Judge for the District of Oregon, is sitting by designation.

vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Therefore,

IT IS ORDERED that the citation of *Durso* v. *Rowe*, 430 F. Supp. 49, 52 (N. D. Ill. 1977) appearing on page 7 of the opinion of this court in this case dated August 2, 1978 is hereby DELETED.

IT IS FURTHER ORDERED that, in all other respects, the aforesaid petition be, and the same is hereby, DENIED.

APPENDIX K.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Region V
300 South Wacker Drive
Chicago, Illinois 60606

January 9, 1974

Dr. Helen Cohen
5555 South Everett
Apartment 11-D
Chicago, Illinois 60637

Dear Dr. Cohen:

This letter is to inform you of the results of our investigation of your sex discrimination complaint filed against the Illinois Institute of Technology.

During the investigation, members of the Institute staff and faculty were interviewed. Pertinent records were also reviewed.

For your information, a summary of the findings and proposed remedial action is enclosed.

Sincerely yours,

/s/ LUCILE ISH for
Kenneth A. Mines
Regional Civil Rights Director

Enclosure

REPORT OF THE INVESTIGATION

OF

DR. HELEN COHEN VS. ILLINOIS INSTITUTE OF TECHNOLOGY

A. *Allegations:*

Dr. Cohen alleges that the Illinois Institute of Technology discriminated against her on the basis of her sex when it:

1) denied her tenure and promotion,

2) paid her less than similarly situated and less qualified males.

B. *Institute's Rebuttal:*

In a July 12, 1973, letter to Miss Odessa L. Fellows, Acting Chief of the Higher Education Branch, Dr. James J. Brophy, Academic Vice President at Illinois Institute of Technology, gave the University's position. The position was that "Denial of tenure promotion to Dr. Cohen in 1971 was a result of the financial stringencies facing Illinois Institute of Technology and our decision as to the appropriate number of the tenured faculty in the Department of Psychology and Education".

C. *Findings*

I. Denial of Tenure/Promotion

a) Institute policy and procedure as stipulated in the Institute's Faculty/Staff Handbook is that Assistant Professor appointments are made for three years, and Assistant Professors are eligible for a second three-year appointment. If promotion is not made during or at the end of the second three-year appointment, connection with the University is severed.

b) Dr. Cohen was initially appointed Assistant Professor in the Department of Psychology and Education for the academic year 1966-67. The third year of her second term as Assistant Professor would have been 1972. Dr. Cohen was recommended for tenure/promotion by the Department Chairman for three consecutive years; in 1969, 1970, and 1971.

The second year of her second three-year term was the period for which the mandatory consideration for tenure promotion was to take place; this was 1971. The Department Chairman, Dr. Shurrager, recommended her to Dean Grip in a February, 1971, letter. No argument against her competence has been presented to us by the Institute at any time. On April 8, 1971, Dr. Shurrager, Chairman of the Department, wrote a memorandum to Dr. Grip, Dean of the College of Liberal Arts. In this letter he stated that "She had the support of the faculty and of the graduate students in the Counseling-Community Program" and that "Dr. Cohen's record at Illinois Institute of Technology is such that she should have received better treatment than summary termination". The departmental recommendation was not concurred with by Dr. Grip, Dr. Brophy, and President Retaliata. Instead of returning to the Department for her terminal year, Dr. Cohen wrote a letter of resignation dated October 1971. Her resignation was accepted by the Institute.

c) In the College of Liberal Arts, the "ceiling on tenured positions" rule had the effect of applying to three females coming up for tenure promotion and no males.

d) Only three people in the College of Liberal Arts lost employment under the "ceiling on tenured positions" rule since 1970-71; all were female.

e) One male and no females were granted tenure/promotions for the academic year 1971-72 in the College of Liberal Arts; in the entire Institute four males and no females were granted tenure.

f) There were three promotions without tenure made in the Department of Education and Psychology; two to the rank of Assistant Professor and one to the rank of full Professor. All three of these individuals were male.

g) Since 1966 2 females and a total of 10 males have been employed in the Department in a tenured position.

h) Availability data indicates that the percent of females with terminal degrees in the fields of psychology and education is relatively high.

i) Only one male Assistant Professor was up for a mandatory "end of fifth year of service in that rank", tenure consideration since 1965. He was denied tenure/promotion because he was not recommended by his department.

Conclusion:

Since no male recommended for tenure/promotion in the College of Liberal Arts was ever denied tenure/promotion under the "ceiling on tenured positions" rule, and since the only Assistant Professors denied tenure and promotion under this rule were female; and since in the same year that three females were denied tenure (and therefore terminated at the end of the then upcoming year), four males and no females were granted tenure, we conclude that there is reasonable cause to believe that complaint was terminated in part because of her sex.

II. *Salary*

We analyzed salary rosters of Dr. Cohen and the average salary of males in the same rank as she for the time periods 1966 to 1973

Conclusion

Dr. Cohen was paid less than the average salary of males in her rank each year of her employment at the Institute. Since she met the same job performance criteria as the males and had the same number of years in service at this rank, and since her department felt that the quality of her work merited promotion and tenure, we have reasonable cause to conclude that Dr. Cohen was discriminated against because of her sex by the Institute when it paid her less than the average salary of similarly stituated males.

D. *Remedial Action*

I. *Tenure/Promotional Denial*

In order for the Illinois Institute of Technology to come into compliance with Executive Order 11246, as amended by Executive Order 11375, we recommend that an offer be made to Dr. Cohen, immediately, to reinstate her to the tenured rank of Associate Professor. The terms and conditions of her employment are to be those she would have had if her service had not been interrupted.

II. *Salary*

In order for the Illinois Institute of Technology to come into compliance with Executive Order 11246, as amended by Executive Order 11375, we recommend that Dr. Cohen be paid the difference between the salary she earned from October 13, 1968, the date of the amendment, and the average salary of similarly situated males in the College of Liberal Arts plus six percent interest compounded quarterly.

APPENDIX L.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION V
300 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606

OFFICE OF
THE REGIONAL DIRECTOR

August 25, 1976

Dr. Helen Cohen
5555 South Everett Avenue
Chicago, Illinois 60637

Dear Dr. Cohen:

The purpose of this letter is to review the status of your complaint against the Illinois Institute of Technology. In that complaint, you alleged that you had been denied tenure and therefore, promotion and reappointment at the Institute because of your sex in violation of Executive Order 11246, as amended by Executive Order 11375.

The Institute, a Federal contractor, denied the allegation and stated that you were not granted tenure because of severe budget constraints imposed upon the entire Institute including your discipline, the Department of Psychology. They also indicated that due to budget problems no one had been granted tenure in that Department during the period of your eligibility (1969-70, 1970-71, 1971-72).

During the original investigation of the complaint, members of the Institute's faculty and staff were interviewed and available records were reviewed. On December 5, 1973, a Letter of Findings was issued by the Office for Civil Rights which determined that the Institute had discriminated against you because of your sex.

The basic findings and conclusions were:

> "In the College of Liberal Arts the "ceiling on tenured positions" rule had the effect of applying to three females coming up for tenure promotion and no males."
>
> "Only three people in the College of Liberal Arts lost employment under the "ceiling on tenured positions" rule since 1970-71; all were female.
>
> "One male and no females were granted tenure/promotion for the academic year 1971-72 in the College of Liberal Arts; in the entire Institute four males and no females were granted tenure."

Conclusion:

> "Since no male recommended for tenure/promotion in the College of Liberal Arts was ever denied tenure/promotion under the "ceiling on tenured positions" rule and since the only Assistant Professors denied tenure and promotion under this rule were female; and since the same year that three females were denied tenure (and therefore terminated at the end of the then upcoming year) four males and no females were granted tenure, we conclude what there is reasonable cause to believe that the complainant was terminated in part because of her sex."

Discussion

Subsequently the case was submitted to OCR's Washington Office for review. It was determined that additional information was required regarding those individuals granted tenure during the period of your eligibility as well as those rejected.

The Institute supplied a list indicating individuals terminated in the College of Liberal Arts from 1969-70 to 1973-74. However, none of these terminations were for reasons similar to your circumstances.

A second list was also provided by the Institute indicating fifteen individuals (including your name) who were recommended for tenured positions but not so promoted. However with the exception of the two females, yourself, and Dr. Sawyier none of the fifteen individuals appear as a termination on any documents provided by the Institute.

On May 14, 1976, the Institute was asked to clarify this discrepancy by indicating the ultimate disposition of these fifteen individuals regarding the question of tenure.

On June 12, 1976 the Institute responded as follows:

> "The Institute's records indicated that of the fifteen, ten were promoted in subsequent years."
>
> Five resigned - three males plus you and Dr. Sawyier.

Thus the Institute confirmed that ten of the fifteen individuals were ultimately granted tenure. The Institute did not indicate the circumstances under which the three males resigned.

Another area requiring clarification involved the budgeted positions authorized for the Psychology Department during the period of your

eligibility. Though the Psychology Department was, according to the Institute, under a severe budget constraint, two new positions at the Assistant Professor level were added in the 1969-70 academic year.

On May 14, 1976, the Institute was asked to clarify why this action was feasible since it was their position that you were not granted tenure due to lack of funds.

On June 2, 1976, the Institute responded with a list of faculty employed by the Department and added the following:

> "Thus the 18 persons from the 1968-69 year was increased to 20 in the year 1969-70, decreased to 19 in the years 1970-71."

On this point the Institute did not clarify why such action was feasible.

Finally in OCR's letter of May 14, 1976, the Institute was asked to clarify the reasons for granting tenure to male candidates throughout the College of Liberal Arts during the period of your eligibility but not to females. The Institute has continuously taken the position that the severe budget constraint "was an economic fact of life applicable to the entire Institute." Therefore, the relevant factors used to make such decisions under these circumstances was requested.

On June 2, 1976, the Institute replied that "University teachers are not fungible" and added "a third grade teacher may be able to teach all (or most) third grade subjects but a Sociology teacher is not a substitute for a Psychology teacher."

Since it was determined that the University's responses to the questions indicated were ambiguous or incomplete, a meeting was held with the Institute's Attorney Mr. E. Allen Kovar on June 25, 1976. The ambiguities were discussed and it was agreed that more specific information would be provided within two weeks. On July 30, 1976 Mr. Kovar indicated by letter that summer schedules had caused a delay in obtaining the additional information and it would be forwarded as soon as it was available.

Conclusion

1) The University acknowledged that ten of the fifteen candidates (all male) initially denied were ultimately granted tenure. The only two females on the list were denied tenure and the circumstances of the remaining three males' resignations is unclear. This activity occurred even though by the Institute's own position a severe budget constraint existed throughout the School.

2) The Institute has failed to satisfactorily explain the reasons it was possible to add two new positions to the Psychology Department during Dr. Cohen's eligibility.

3) The Institute has not explained its rationale for granting tenure in some departments where economic constraints existed and not others.

Therefore it is concluded that the reinvestigation affirms the original findings that you were discriminated against because of your sex.

Remedial Action

In view of these factors it is determined that the remedial action specified in the original letter of findings is re-affirmed. The remedy stated was as follows:

> "In order for the Illinois Institute of Technology to come into compliance with Executive Order 11246 as amended by Executive Order 11375, we recommend that an offer be made to Dr. Cohen immediately to reinstate her to the tenured rank of Associate Professor. The terms and conditions of her employment are to be those she would have had if her service had not been interrupted."

The Institute has also been notified by letter and will have thirty days from the receipt of this letter to object to the findings determined by this Office.

Subsequent to this a conciliation meeting will be arranged between the Institute and the Office for Civil Rights in an effort to settle the case. The results of that meeting will determine what additional action will be required by this Office.

If you have any questions please feel free to contact me.

Sincerely,

Charles E. Diffo for

Kenneth A. Mines
Director
Office for Civil Rights
Region V, Chicago

Supreme Court, U. S.
FILED
JAN 15 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTION OF TECHNOLOGY, AN ILLINOIS NOT-FOR-PROFIT CORPORATION, JAMES J. BROPHY, JOHN T. RETTALIATA, AND MAYNARD P. VENEMA,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

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Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

On January 8, 1979, this Court granted its writ of certiorari in No. 78-753, opinion below reported as *Novotny* v. *Great American Savings & Loan Association*, 584 F. 2d 1235 (3rd Cir. 1978) (*en banc*). The issues in *Novotny* are closely related to the third Question Presented in the petition in the instant case.

The *Novotny* court applied 42 U. S. C. § 1985(3) to gender-based discrimination by private corporate officials. It held, *inter alia*, that § 1985(3) "protects against conspiracies motivated by discriminatory animus against women" (*id.* at 1262), and it found constitutional authority for such application from the Commerce Clause by Title VII of the Civil Rights Act of 1964 (*ibid.*).

Petitioner in the instant case, likewise suing private corporate officials under § 1985(3) for discrimination against women, does not urge a constitutional basis through Title VII. (The statute was inapplicable at the time of the original discrimination, App. B, at 9a.) She does, however, rely on Section 5 of the Fourteenth Amendment, an issue which to the *Novotny* court was "not necessary at this time to resolve" (*id.* at 1255, and n.101). Petitioner had also urged alternative Fourteenth Amendment ties, first by reason of 42 U. S. C. § 1983 State action, and second by reason of the non-discrimination provision of the State constitution (Pet. Cert. p. 3). While these alternatives were not discussed in any of the *Cohen* decisions or made the subject of a Question Presented, they are "subsidiary questions fairly comprised therein" within the meaning of Rule 23(1)(c).

The *Novotny* decision, published in the December 18, 1978 Federal Reporter (and therefore not discussed in the Petition in the instant case), makes frequent reference to inter-circuit conflicts regarding the scope of § 1985(3), and repeatedly discusses *Cohen I.* (See, for example, footnotes 36, 48, 67, 125, and, especially, 101.)

We suggest, therefore, the appropriateness of granting certiorari in this case and combining this case with *Novotny* for the purposes of argument pursuant to Rule 43(5).

Respectfully submitted,

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Suite 4600
Chicago, Illinois 60611
Attorney for Petitioner

Supreme Court, U. S.
FILED
DEC 26 1978
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

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ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Introduction and Description of Opinion Below	1, 2
Question Presented	2
Statement of the Case	2
Reasons for Denying the Petition for a Writ of Certiorari	4
I. The Addition of A Conclusory Allegation Did Not Create A Valid Complaint	4
II. No Conflict Between The Courts of Appeal Exists With Respect To What Constitutes State Action	7
III. Petitioner's Argument That Section 1985(3) Is A General Tort Law Is Unmeritorious	9
Conclusion	11

TABLE OF AUTHORITIES

CASES

Anderson v. *Sixth Judicial District Court*, 521 F.2d 420 (8th Cir. 1975)	6
Braden v. *Univ. of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977)	7
Coates v. *Ill. State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977)	6
Conley v. *Gibson*, 355 U.S. 41 (1967)	4
Estelle v. *Gamble*, ... U.S. ....., 97 S. Ct. 285, 293 (1976)	5
Haines v. *Kerner*, 404 U.S. 519 (1972)	4, 5
Hoffman v. *Halden*, 268 F.2d 280, 294 (9th Cir. 1959)	6

PAGE

Kadar Corp. v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) 5

Kauffman v. *Moss*, 420 F.2d 1270, 1275 (3rd Cir. 1970) 6

Koch v. *Yunich*, 533 F.2d 80, 85 (2nd Cir. 1976) 6

McGuire v. *Todd*, 198 F.2d 60, 63 (5th Cir. 1952) *cert. denied* 344 U.S. 835..... 6

Morpurgo v. *Bd. of Higher Ed. in City of New York*, 423 F. Supp. 704, 713 (S.D.N.Y. 1976) 7

Means v. *Wilson*, 522 F.2d 833, 840 (8th Cir. 1975) 6

Place v. *Shepherd*, 446 F.2d 1239 (6th Cir. 1971) 6

United States v. *Guest*, 383 U.S. 745, 761, 777 (1966) 9, 10

United States v. *Price*, 383 U.S. 787, 799 (1966) 10

CONSTITUTION AND STATUTES

United States Constitution, Amend. XIV, §§1 and 5 .....9, 10

42 U.S.C. §1983 [1970] 4

42 U.S.C. §1985(3) [1970] 9

OTHER AUTHORITIES

Wright & Miller, *5 Federal Practice and Procedure;* Civil §1357 (1969) 5

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Twice the District Court dismissed Petitioner's complaint for failure to allege a federal cause of action. The court held that no state action was alleged for which a Section 1983 and 1985(3) complaint could lie. Twice the Court of Appeals for the Seventh Circuit affirmed the dismissal. Twice the Court of Appeals denied Petitioner's requests for a rehearing. Twice not one single member of the Court of Appeals voted to hear the Petitioner's appeal *en banc.*

And now, for the second time, Petitioner asks this Court to review the dismissal of her complaint. Respondents hereby oppose the petition for certiorari.

OPINIONS BELOW

The District Court for the Northern District of Illinois initially dismissed the Petitioner's complaint on October 29, 1974. The decision is reported at 384 F. Supp. 202.

The dismissal was affirmed by the Court of Appeals for the Seventh Circuit on October 28, 1975. This decision is reported at 524 F.2d 818.

Petition for certiorari was denied on April 19, 1976. The denial was reported at 425 U.S. 943.

Petitioner's motion to amend her complaint was denied by the District Court on March 25, 1977. This decision is set forth in App. G of Petitioner's Appendix to this Petition.

The denial was affirmed on August 2, 1978. This decision is reported at 581 F.2d 658.

QUESTION PRESENTED

Did the District Court abuse its discretion in denying Petitioner's motion to amend her complaint?

STATEMENT OF THE CASE

Petitioner (at p. 4 of her Petition) erroneously states that she received leave to amend her complaint. She did not. Petitioner did obtain an order from the Court of Appeals that the District Court should consider and decide the Petitioner's motion for leave to amend, but specifically noted that "This Court does not hereby express any opinion regarding the merits of the Petitioner's motion to amend her complaint." (App. p. 28a)

Further, Petitioner erroneously characterized the Court of Appeal's first decision (at p. 4 of her Petition) as one

which "delineated the allegations necessary to state a claim. . . ." But, to the contrary, the Court of Appeals specifically noted that its original decision did not draw out with specificity the necessary allegations. Rather the Court of Appeals "set out the general nature of the allegations needed but did not state what specific facts need be alleged." (App. p. 41a)

Finally, Petitioner misleadingly quotes from the Court of Appeals' last decision by quoting from that Court's summary of her own argument. Thus, she states (at p. 4 of her Petition) that the "Court of Appeals has now held that the amended complaint, though it 'contain[s] the precise language noted by the Court, to have been missing from original complaint' does not state a claim. . . ." (App. I, at 38A) What the Court of Appeals held was (App. p. 41a):

> "We agree with the District Court that the proposed amendment 'does not allege affirmative governmental support or approval of any discriminatory act or policy of defendants.'
>
> Lastly, the District Court was not stripped of its discretionary power to deny the motion to amend the complaint because of the law of the case doctrine. *Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations. Hence, Cohen's repetition of broad conclusions without additional facts establishing that the defendants acted under color of state law in their discrimination against her is insufficient. Nothing more than general categorizations are to be found in the proposed amendment; a mere recitation of broad conclusory language misses the

mark. As we fail to see how the proposed amendment escapes the deficiencies of its precursor, we hold that the amended complaint, like the original, fails to state a federal cause under 42 U.S.C. §1983."

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The Addition of A Conclusory Allegation Did Not Create A Valid Complaint.

Petitioner claims that the dismissal of her complaint violates the rule of *Conley* v. *Gibson*, 355 U.S. 41 (1967). *Conley* merely restated the general rule that a plaintiff need not "set out in detail the facts upon which he bases his claim." (at p. 47) This does not mean, nor has this Court ever held, that mere conclusory allegations are sufficient to support a complaint. The "less stringent standards" applied to a *pro se* complaint in *Haines* v. *Kerner*, 404 U.S. 519 (1972) have no application to the case at hand, in which Petitioner has been represented by counsel throughout.

Petitioner initially alleged that state action was involved because, *inter alia*, (1) certain graduate students worked at state agencies as part of their graduate program (Para. 8(h) of the Complaint, see App. P. 10a); (2) the university conducted seminars in cooperation with state agencies (Para. 8(i) of the Complaint; see App. p. 10a); (3) the university administered a state scholarship program (Para. 8(m) of the Complaint, see App. p. 11a); and (4) the university solicited the power of eminent domain from the state (Para. 8(n) of the Complaint, see App. p. 11a). The District Court originally concluded that these allegations did not create state action, and the Court of Appeals affirmed.

Thereafter, Petitioner attempted to amend her complaint by alleging that the four allegations of university involvement with the state "significantly supports and contributes to the effectiveness" of the alleged sex discrimination. (Para. 8(o) of the Amendment; see App. p. 37a) Petitioner further alleged that the Respondent university "is dependent on such state support" and that:

> "Both the State and the Federal support are contingent upon the Defendants' not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State and Federal approval of the conduct complained of herein." (App. p. 37a)

These conclusory allegations do not create a federal cause of action. Even applying the more liberal, and here inapplicable, *Haines* rule, (404 U.S. 519) this Court has held that a review of the factual allegations of a complaint may clearly show that the alleged cause of action did not exist. *Estelle* v. *Gamble*, ... U.S. ....., 97 S. Ct. 285, 293 (1976).

The Court in *Haines* referred to *less* stringent standards applying to a *pro se* complaint. The obvious implication is that a complaint drafted by an attorney must at least meet some standard of setting forth a cause of action. Mere conclusions will not, and do not, suffice.

In *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 233 (1st Cir. 1977) the court quoted from Wright & Miller, *5 Federal Practice and Procedures* Civil §1357 (1969):

> ". . . courts do 'not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened.' . . ."

See *Koch* v. *Yunich*, 533 F.2d 80, 85 (2nd Cir. 1976); *Kauffman* v. *Moss*, 420 F.2d 1270, 1275 (3rd Cir. 1970) *cert. denied* 400 U.S. 846 (1970); *McGuire* v. *Todd*, 198 F. 2d 60, 63 (5th Cir. 1952) *cert. denied* 344 U.S. 835; *Place* v. *Shepherd*, 446 F.2d 1239 (6th Cir. 1971); *Anderson* v. *Sixth Judicial District Court*, 521 F.2d 420 (8th Cir. 1975); *Means* v. *Wilson*, 522 F.2d 833, 840 (8th Cir. 1975) *cert. denied* 424 U.S. 958; *Hoffman* v. *Halden*, 268 F.2d 280, 294 (9th Cir. 1959).

In *Coates* v. *Ill. State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977) the court stated:

> "Especially in the school desegregation area, conclusory pleading such as evidenced in this complaint is woefully inadequate. Direct linkage between the facts pleaded and the violation asserted must exist on the face of the complaint. Put another way, a 'plaintiff is required to set forth specific illegal misconduct and resultant harm in a way which will permit an informed ruling whether the wrong complained of is of federal cognizance.' *Duncan* v. *Nelson*, 466 F.2d 939 (7th Cir. 1972), *certiorari denied*, 409 U.S. 894, 93 S. Ct. 116, 34 L.Ed.2d 152."

In the case at hand, Petitioner was advised that her complaint was deficient; she was told that state action requires a connection between the state and the action complained of, and she then alleged that the state "supported" the action complained of. This conclusory allegation does not find support in her earlier allegations of state involvement. The District Court properly concluded (App. 30a):

> "The new allegation merely alleges the condition upon which financial support is granted to the defendants, except for the conclusory speculation that this 'constitutes State and Federal approval' of defendants' alleged discriminatory practices. In our opinion, this does not allege affirmative governmental support or approval of any discriminatory act of policy of defendants (524 F.2d at 824) and, in fact, contradicts the prior reasonable allegation that government financial support is contingent upon non-discrimination."

As pointed out by the District Court in *Morpurgo* v. *Bd. of Higher Ed. in City of New York*, 423 F. Supp. 704, 713 (S.D.N.Y. 1976):

> ". . . liberal construction of pleadings should not be permitted to override completely the rights of defendants."

The respondents are entitled to be free from further federal litigation of this matter. The petition should be denied.

II. No Conflict Between The Courts of Appeal Exists With Respect to What Constitutes State Action.

Petitioner urges that various courts of appeal are sharply split as to what constitutes state action. (Petition p. 14). We submit that no such conflict exists.

Petitioner apparently believes that the "symbiotic relationship" basis for finding state action is contrary to, or inconsistent with the so-called "nexus" basis. Thus, she argues that *Braden* II (*Braden* v. *Univ. of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977)) did not follow the *Cohen* I decision (524 F.2d 818) because the Third Circuit did not accept the "nexus" test. However, all that *Braden* II held was that the *Cohen* decision was inapplicable (at p. 964):

> "Nevertheless, *Cohen* would appear to be distinguishable from the case at hand—chiefly because there is

no statutory program which inextricably links I.I.T. to the State of Illinois. Contrary to the Pitt situation, the level of financial support offered I.I.T. by the state is minimal. Judge Stevens expressly stated that 'the funds contributed by the State represent only a small fraction of the cost of educating the students. . . .' In addition, I.I.T. selected its own institutional name, unlike the statutory designation of the University of Pittsburgh as a Commonwealth school. Moreover, the regulations imposed by the state are far less extensive in *Cohen* than in the present case. Basically, the Illinois provisions speak to the issue of accreditation and little else, whereas the University of Pittsburgh-Commonwealth Act is far more sweeping in its scope.

Perhaps the most important basis for distinguishing *Cohen* from this case is the absence there of other indicia of a close relationship between the state and the university, including, *inter alia,* (1) governmental participation in determining the composition of the board of trustees, (2) the review of the expenditure of private funds by state officials, (3) onerous reporting requirements, (4) a legislative history which discloses that the state desired to utilize the educational facilities of an existing institution rather than create new ones itself; and especially (5) the statutory declaration that Pitt is an 'instrumentality' of the Commonwealth. Indeed, the *Cohen* opinion vigorously emphasizes that there was no 'evidence that [I.I.T. is . . . a State instrumentality. . .' Had there been such evidence in *Cohen,* the Seventh Circuit may well have reached an opposite result and found state action. By its own terms, then, *Cohen* constitutes a case considerably different from the one with which we are now concerned."

In her first petition for certiorari, Petitioner also argued that there was a majority view ("significant state aid" constitutes state action) and a minority view (a

nexus is required). Her identical argument now is no more valid than before. The tortured attempt to find a conflict is not supported by the cases.

III. Petitioner's Argument That Section 1985(3) Is A General Tort Law Is Unmeritorious.

Petitioner finally urges that this Court should review the decision below because this Court has not yet decided whether §1985(3) can reach a conspiracy such as alleged in this case. The same argument was made in the first petition for certiorari.

Petitioner states that the First, Second, Third, Sixth and Eighth Circuits have ruled that §1985(3) would apply in a case such as this. In support of this conclusion she cites a number of cases in which there was no question but that state action was involved, or cases in which federal constitutional or statutory rights were involved.

We submit that this case is not the vehicle upon which the Court can, should it desire, amplify on the scope of Section 1985(3).

The language of the concurring and dissenting opinions in *United States* v. *Guest,* 383 U.S. 745 (1966) is not inapposite as Petitioner argues. While those opinions suggest that Section 5 of the Fourteenth Amendment empowers Congress to enact laws punishing all conspiracies which interfere with a Fourteenth Amendment right, the Fourteenth Amendment right referred to was "the right to equal utilization of *state facilities.*" (Italics supplied) *United States* v. *Guest,* 383 U.S. at 761 and 777. The language in those separate opinions in *Guest* does not suggest that Section 5 of the Fourteenth Amendment could reach wholly private conspiracies to deprive an individual

of a claimed right to equal utilization of a *private* facility. State involvement is key to triggering the protection of the Fourteenth Amendment. The decision in *Guest* is consistent with the holding in *United States* v. *Price,* 383 U.S. 787, 799 (1966), decided by this Court on the same day, that the Fourteenth Amendment only protects against state action.

Members of this Court have indeed differed as to the scope of Section 5 of the Fourteenth Amendment. But not one member has suggested that it authorizes a general federal tort law. "As we have consistently held 'The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by individuals.' *Williams I,* 341 U.S. at 92. . . ." *United States* v. *Price,* 38 U.S. 787, 799 (1966). In *United States* v. *Guest,* 383 U.S. 745 (1966) Mr. Justice Brennan stated that a majority of the members of this Court were expressing the view that Section 5 empowered Congress ". . . to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights. . . ." (383 U.S. at 782) But not one member of this Court has suggested that a private employer's alleged discrimination in determining whom he shall employ violates a Fourteenth Amendment right.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, AN ILLINOIS NOT-FOR-PROFIT CORPORATION, JAMES J. BROPHY, JOHN T. RETTALIATA, AND MAYNARD P. VENEMA,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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The only response merited by the Brief in Opposition is to note that the respondents' listing (Br. Op. p. 4) of the allegations in our complaint as to State Aid and support of IIT omits reference to the State Grant Program and the State Guaranteed Loan Program (App. B, at 11a, n. 9).

These two programs happen to be the principal source of State financial support to IIT.

As for the other issues raised or not raised in the Brief in Opposition—whether we have "erroneously" or "misleadingly" stated the facts (Br. Op. pp. 3, 4), whether there is a direct literal conflict with *Conley* (Br. Op. p. 4), whether there is

"no conflict" among the circuits on the State Action Test for § 1983 (Br. Op. p. 7), or whether we have made the fatuous arguments attributed to us for § 1985(3) (Br. Op. p. 9)—can be resolved merely by reference to the record, the opinions, and to our Petition.

CONCLUSION.

This case is a perfect vehicle for this Court to consider all three of the Questions Presented. The petition should be granted.

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